TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~523~~ 803

MARY WALKER, J. WALKER, AND J. McALPINE, PLAINTIFFS IN ERROR,

vs.

IRAM HENSHAW, C. KNOHLER, W. R. REECE, J. M. REECE, AND FREDERICK WHYBLE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED MARCH 17, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 528.

MARY WALKER, J. WALKER, AND J. McALPINE, PLAINTIFFS IN ERROR,

vs.

IRAM HENSHAW, C. KNOHLER, W. R. REECE, J. M. REECE, AND FREDERICK WHYBLE, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	1
Petition in error	6	2
Præcipe for summons	7	2
Petition	10	3
Summons	12	4
Return	13	4
Answer of Iram Henshaw	15	5
Christian Knohler	26	8
William R. Reece	37	11
J. M. Reece	39	12
Frederick Whyble	41	12
Edward Hale	51	15
William Bryman	62	18
Daniel Kraus	73	22
Replications	84	25
Judgment	94	28
Judgment vacated, new trial ordered	95	28
Order of reference	95	28
Answer of M. Stubbs	96	29
J. Weaver	100	30
Otis Richards	105	31
Replication to answer of Stubbs	109	33
Weaver	110	33
O. Richards	111	33
Argument before referee	112	33
Report of referee	114	34
Motion to set aside report	126	38

	Original.	Print.
Order of ratification	128	38
Judgment	129	38
Certificate of clerk supreme court Kansas	133	40
Writ of error to supreme court of State	135	40
Final judgment	138	41
Clerk's certificate	142	42

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the hon. the judges of the supreme court of the State of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decission could be had, in the said suit between Mary Walker and Is'iah Walker, and John McAlpin, plaintiffs, and Iram Henshaw, Christian Knohler, W'm R. Reece, I. M. Reece, Frederick Whyble, Edward Hale, William Bryman, Daniel Kraus, Barkley Thomas, Mahlin Stubbs, I. Weaver, and Otis Richards, defendants, wherein was drawn in question the construction of treaties, and also a statute of the United States, and the decission was against the right, title, and authority specially set up and claimed under such treaties and statute, a manifest error hath happened, to the great damage of the said plaintiffs as by their complaint appears:

We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that if judgment be therein
2 given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the first Monday of December next, in said Supreme Court, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon'l Salmon P. Chase, Chief Justice of the said Supreme Court, this 19th day of October, in the year of our Lord one thousand eight hundred and seventy.

A. S. THOMAS, *Clerk.*

3 UNITED STATES OF AMERICA, *ss:*

To Iram Henshaw, Christian Knohler, W'm R. Reece, I. M. Reece, Frederick Whyble, Edward Hale, William Bryman, Daniel Kraus, Barkley Thomas, Mahlin Stubbs, I. Weaver, and Otis Richards:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Kansas, wherein Mary Walker and Is'iah Walker, and John McAlpin are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel A. Kingman, chief justice of the supreme court of the State of Kansas, this 19th day of October, A. D. 1870.

SAMUEL A. KINGMAN.

4 STATE OF KANSAS,
Douglas County, ss:

Wilson Shannon, jr., being by me first duly sworn, deposes and saith that, on the 22d day of October, A. D. 1870, he delivered to Messrs.

Thatcher and Banks, the attorn*ies* of record for the above-named defendants in error, a true copy of the above citation, and at the same time exhibited to them the within citation.

WILSON SHANNON, JR.

Sworn to and subscribed before me this 24th day of October, A. D. 1870.

[SEAL.] W. H. H. WHITNEY,
Notary Public Douglas County, Kansas.

(Indorsed:) Mary Walker et al. vs. Iram Henshaw et al. Citation.

5 Be it remembered that heretofore, to wit, on the 13th day of October, A. D. 1869, John McAlpin et al. filed in the clerk's office of the supreme court of the State of Kansas his petition in error against Iram Henshaw et al., def't, and also a transcript of the record of the district court of Douglas County, Kans., in the same case, which petition in error and transcript are in words and figures as follows, to wit:

6 STATE OF KANSAS:

Supreme court of said State.

Petition in error.

JOHN MCALPIN, MARY WALKER, AND ISAIAH Walker, plaintiffs,
vs.
IRAM HENSHAW, CHRISTIAN KNOHLER, WILR. Reece, J. N. Reece, Frederick Whyble, Edward Hale, William Bryman, David Kraus, Otis Richards, and Mahlon Stubbs, defendants.

The above-named plaintiffs complained of the above-named defendants, for that the said defendants, at the November term of the district court, A. D. 1866, to wit, on the 5th day of January, A. D. 1867, sitting in and for the said county of Douglas, and State of Kansas, recovered a judgment and decree of said court by the consideration of said
7 court against the said plaintiffs, in a certain action then pending in said court, wherein the above-named plaintiffs were plaintiffs, and the above-named defendants were defendants; a copy of the record of said judgment and decree and proceedings in which case, duly certified, is hereto attached, marked "A," and made a part of this petition; and the above-named plaintiffs aver that there is error in the said record and proceedings, in this, to wit:

1st. The said court erred in overruling the motion of the plaintiffs to set aside the report of the Hon. Nelson Cobb, referee, for the reason stated in said motion.

2d. That the court should have rendered a judgment for the said plaintiffs, and not for the said defendants, on the facts found by said referee.

3d. That the said judgment and decree was given for the said defendants, when it ought to have been given for said plaintiffs, according to the law of the land.

8 The said plaintiffs, therefore, pray that the said judgment and

decree may be reversed, and judgment entered for the said plaintiffs, or the cause remanded to the district court for a new trial or further proceedings.

WILSON SHANNON,
Att'y for Pl'ffs.

STATE OF KANSAS, *Supreme Court:*

The clerk of the supreme court will issue a summons for the above-named defendants in the above-entitled suit, directed to the sheriff of Douglas County, State of Kansas, returnable according to law.

July 24th, 1869.

WILSON SHANNON,
Att'y for Pl'ffs.

THE STATE OF KANSAS, *Supreme Court:*

I, Abram Hammatt, clerk of said court, do certify that the above is a true copy of the petition in error, and precipe for summons
9 attached to said petition in error in the above-entitled cause, as filed in my office October 13th, 1869, and made a part of the record of said case.

Witness my hand and official seal hereto affixed this 25th day of October, A. D. 1870.

[SEAL.]

A. HAMMATT,
Clerk Supreme Court State of Kansas.

(Indorsed:) Mary Walker et al. vs. Iram Henshaw et al. Writ of error.

10 Be it remembered that, heretofore, to wit, on the 21st of February, A. D. 1865, John McAlpine et al. filed in the clerk's office of the district court sitting in and for Douglas County, State of Kansas, their certain petition against Iram Henshaw et al., which said petition is in words as follows, to wit:

Petition.

Fourth district court, Douglas County, Kan's.

JOHN MCALPINE, MARY WALKER, AND ISAIAH Walker, her husband, pl'ffs,
vs.
IRAM HERNSHAW, CHRISTIAN KNOHLET, W'M R. Reece, I. M. Reece, Frederick Whible, Edward Hale, W'm Bryant, and Daniel Kraus, defendants.

The plaintiffs say:—

1st. They have a legal estate in, and are entitled to the possession of, the following-described premises, situate in said county of Douglas
11 and State of Kansas, to wit: The east half of section No. seventeen, (17,) containing three hundred and twenty acres of land, the northeast quarter of section No. twenty, (20,) containing one hundred and sixty acres, containing in the aggregate *six hundred and forty* acres, all being in township thirteen (13) south of range No. twenty-one (21) east of the sixth principal meridian, Kansas, and all being and lying in one compact body.

2d. The said defendants *evur* that, since the 3d day of May, A. D. 1861, have unlawfully kept the said plaintiffs out of the possession of said premises.

3d. The plaintiffs ask judgment for the delivery of the possession of the said premises to them, and also for the costs of this suit.

Dated Feb. 20th, 1865.

SHANNON & SHANNON,
Plaintiffs' Attorneys.

12 *Precipe.*

In the district court aforesaid.

JOHN MCALPINE, MARY WALKER, AND ISAIAH Walker, plaintiffs,
vs.
IRAM HENSHAW, CHRISTIAN KNOHLET, Frederick Whyble, W'm R. Reece, J. M. Reece, W'm Bryman, Edward Hale, & Daniel Kraus, def'ts.

To the clerk of said court:

Issue summons in said case for the said defendants, directed to the sheriff of Douglas County.

Dated Feb. 20th, 1865.

SHANNON & SHANNON,
Pl'ffs' Att'ys.

Whereupon, on the said precipe, the following summons was issued, to wit:

STATE OF KANSAS,
County of Douglas, ss:

The State of Kansas, Douglas County, to the sheriff of Douglas County, greeting:

You are hereby commanded to notify Iram Henshaw, Christian Knohlet, W'm R. Reece, J. M. Reece, Frederick Whyble, Edward
13 Hale, W'm Bryman, and Daniel Kraus that they have been sued by John McAlpine, Mary Walker, & Isaiah Walker, her husband, in the district court, fourth judicial district, State of Kansas, sitting within and for the county of Douglas, and that they must answer the petition filed against them in the clerk's office of the said court on or before the 23d day of March, A. D. 1865, or such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on or befor' the 8th day of March, A. D. 1865. Witness my hand and the seal of said court at my office, in Lawrence, in said county of Douglas, this 21st day of February, A. D. 1865.

[L. S.] S. A. STONEBRAKER, *Clerk*,
By A. J. REID, *Dep'ty.*

[A 50-c't I. R. stamp is affixed to original summons.]

SHERIFF'S OFFICE, DOUGLAS COUNTY, KAN'S.

Received the within summons the 23d day of February, A. D.
14 1865, at 7 o'clock p. m., and as commanded, I summoned Christian Knohlet, Frederick Whytal, Edward H., and William Bryman, by

delivering each of them personally a copy of this summons, on the 23d day of February, A. D. 1865, and to Iram Henshaw, W'm R. Reece, J. M. Reece, and Daniel Kraus, by leaving a copy of this summons at their usual place of residence, on this 23d day of February, A. D. 1865.

Summons, 2 25; mil'age, 4 00—$6 25.

STEPHEN OGDEN,
Sheriff of Douglas County.

The following agreement of plaintiffs to extend the time for defendants to answer in this case was filed in the clerk's office of said court, to wit:

STATE OF KANSAS,
County of Douglas:

District court.

MCALPINE ET AL.
vs.
W. WHYBLE ET AL.

It is agreed that defendants may have fifteen days additional to
15 answer in.

WILSON SHANNON,
Att'y for Pl'ffs.

Afterwards, to wit, on the 3d day of April, A. D. 1865, the following answer of Iram Henshaw, one of the defendants in the above-entitled cause, was filed in the clerk's office of said court, and is in words *of* follows, to wit:

Answer of Iram Henshaw, defendant.

District court, county of Douglas, Kansas.

JOHN MCALPINE ET AL, PL'FFS,
vs.
IRAM HENSHALL ET AL'S, DEF'TS.

The defendant, Iram Henshaw, for himself alone, answering the petition of the plaintiffs in this case filed, shows to the court—

I. For a first defense to the cause of this action set out in
16 said petition the said defendant avers that there is a misjoinder of parties in this: that this defendant has not and never had possession of, or made any claim to, the northeast and the southeast quarters of section seventeen, the east half of the northeast quarter of section twenty, and the northeast quarter of section twenty-one, all being in township thirteen south of range twenty and east of the sixth principal meridian, Kansas, and in the said county of Douglas, in said State, it being three and one-half quarter sections, containing, in the aggregate, five hundred and sixty acres of land, mentioned and described in the said petition of plaintiff, nor any part thereof, and never in anywise has, directly or indirectly, or unlawfully kept the said plaintiffs out of the possession of the said premises herein above described, or any part thereof.

And the said defendant further says that the said defendant, Christian

Knohlet, W'm R. Reece, J. M. Reece, Freder'ck Whyble, Edward Hale, W'm Bryman, and Daniel Kraus, and neither of them, has nor
17 never had possession of, or made any claim to, the west half of the northeast quarter of section twenty, township thirteen of range twenty-one, in said county, containing eighty acres of land, a part of one of the pieces and parcels of land mentioned and described in the plaintiffs' petition, nor any part thereof; (and that they never, and neither of said defendants never, in anywise, either directly or indirectly, or unlawfully, kept said plaintiffs out of the possession of the said premises last herein described, nor any part thereof.)

But the said defendant avers that he was, at the time of the commencement of this suit, and now is, in possession, solely and exclusively in possession, of the west half of the northeast quarter of section twenty, township thirteen, range twenty-one, in said county, and claims the exclusive right to possess, and now has, and for a long time has had, in severalty and solely, the exclusive title in fee to the last-described quarter section of land.

Whereupon this defendant asks the court for a judgment, that
18 the said petition be dismissed as to him, and that he be allowed to go without day, and for costs of suit.

II. For a second and separate defense to the said cause of action in the said petition contained, the said defendant denies that he unlawfully with'olds from said plaintiffs the possession of the said premises mentioned in said petition, or any part thereof.

III. For a third and further answer the defendant alleges that, at the time and times hereinafter mentioned, one W'm H. Shreeves was a citizen of the United States, over twenty-one years of age, and did not own three hundred and twenty acres of land within the State of Kansas or the United States, and never had had the benefit of any preëmption act of Congress of the United States; that said William H. Shreeves entered in person upon the west half of the northeast quarter of section twenty, township thirteen, range twenty-one, east of the sixth principal meridian, in Kansas, a part of the land men and
19 described in the said plaintiffs' petition, and there, on the 5th day of February, A. D. 1857, made settlement by erecting a dwelling-house and other valuable improvements thereon, with a view to preëmpt the same under the act of Congress of Sept. 4th, 1841, and the acts extending and amendatory thereto; that, at said time of such settlement, said quarter section of land was entirely unoccupied by any person or claimant whatever, and was open and subject to preëmption under said laws; that thereafter & within the time prescribed by law, and on or about the 10th day of February, the said W'm H. Shreeves went personally to the local land office of the Pawnee land district, within the limits of which said land was located, then located at Lecompton, in said county, and territory of Kansas, and duly made in writing, and offered and claimed the right to file his declaratory statement of his intention so to preëmpt said land in said land office of said district, and was
20 prevented from so doing at that time by the officers of said office, viz, by the register and receiver of said lands, and who refused to accept and file said declaratory statement at that time, wrongfully alleging that the said lands were not open for settlement and preëmption, they being Indian lands, which allegation was not true; that thereafter, and at divers times, and repeatedly, the said W'm H. Shreeves went as aforesaid to said land office, and duly made in writing, and offered and claimed the right to file his said declaratory statement of his intention so to pre-empt, as aforesaid, said land, and was then and there as often and re-

peatedly prevented from so doing by said officers of said land office in like manner as aforesaid, and that said Shreeves was so prevented from filing his declaratory statement, or any declaratory statement of his intention to preëmpt said land in said office by said officers of said office, in like manner as aforesaid, until the 28th day of July, A. D. 1858,
when said Shreeves was allowed, by the consent of the said reg-
21 ister and receiver, duly and according to law, to file in said office
his declaratory statement of his intention so to preëmpt said land; that the said Shreeves, from the time of his said settlement as aforesaid, so continued in possession of, and continued to reside on said premises, and in good faith made extensive and valuable improvements thereon up to the 23d day of February, A. D. 1859, when said Shreeves, duly and according to law, preëmpted the same, and paid therefor the minimum Government price, namely, one dollar and one quarter per acre in an Indian military land warrant, No. 75286, and received a certificate from said officers of said land office of the location thereof, on the said northeast quarter of section twenty, and then and there preëmpted the said quarter section of land, and received from said officers a certificate, duly executed according to law, of his said preëmption of said land in
his favor, and that said preëmption, so as aforesaid, had and made
22 by him, was thereafter by the Commissioner of the Land Office at
Washington, duly approved and affirmed in favor of the said Shreeves, and thereafter a patent therefor duly issued by the Government of the United States from the General Land Office to the name of said Shreeves; that the said Shreeves continued to reside on said premises and to make valuable improvements on the same up to the 28th day of February, A. D. 1859, when he sold & conveyed to said defendant Henshaw, and the said defendant, for its value paid, bought all the right, title, and interest in and to the said north half of the northeast quarter of the said section of land of the said W'm H. Shreeves, and immediately took possession of the same, and has ever since resided upon, and now is in possession and occupation of, and now resides on the same, and has continued to make improvements and pay the taxes thereon to the present time, and that his said improvements so as aforesaid made,
23 and now on said premises, and owned by said defendant, are of
the value of thousand dollars; that the same were made thereon by the occupying claimants being in quiet possession of said premises after a settlement made thereon bona fide; that at the time of said settlement, filing on and preëmption by said Shreeves as aforesaid of said quarter section of land, Wyandotte float, numbered , issued to one Irwin P. Long, under which the plaintiffs in this case claim, was not and never had been located in or according to law on the said land, and no part thereof, nor had any location thereon, duly or otherwise, been reported to the surveyor general of said land district, nor to the Commissioner of the General Land Office, nor to the department. But that after said Shreeves had so settled, improved, and filed upon said quarter section of land as hereinbefore set forth and preëmpted the same,
and acquired a vested right therein, and in good faith made im-
24 provements thereon as aforesaid, and on or about the day
of , 186 , the said Wyandotte float was fraudulently attempted to be located, and was, through the fraud, falsehood, and connivance of the parties owning the same located upon lands including and covering the said premises so claimed and occupied by this defendant; that said location of said Wyandotte float was in violation of law and in derogation of the vested rights of said Shreves and of said defendant; that the said location of said float was, and was procured to

be by said parties interested in the same, fraudulently antedated; that at a subsequent period, by means to this defendant unknown, a patent was procured to be issued to said Irwin P. Long from the Government of the United States for six hundred & forty acres of land, embracing therein and including the said piece and parcel of land so as aforesaid settled upon and preëmpted by said Shreves, and sold to and now owned by this defendant as aforesaid; that said patent was
25 procured by false and fraudulent representations to the officers of the United States Government in this, that it was by the parties interested in said float represented that there was no prior legal claimant under the preëmption law to said premises; that the interest of the said Irwin P. Long in and to the said float, and the land conveyed thereby and in said patent were by him conveyed, and that the same were thereafter duly conveyed and transfer'ed to said plaintiffs, who now hold the title they have in said premises as trustees for this defendant, and that the said float was laid and located as aforesaid by said plaintiffs as the agents of or in the name of said Long, they being the real owners of said float, and had knowledge and notice of the facts herein set forth, and that the said defendant nor the said Shreeves never had any knowledge or notice whatever, either actual or constructive, of any location or laying of said float on said land, nor of any claim by the said plaintiffs to said lands in anywise whatever.

26 Wherefore the said defendant prays judgment and decree of the court that the said case be dismissed as against this defendant; that the said defendant holds the right to and the equity to the said premises as settled upon by said Shreves and that the plaintiffs' title thereto is held by them in trust for this defendants, and that said plaintiffs execute a paper and sufficient conveyance of the same to said defendant, in default of which for ten days said decree to operate as such conveyance, or for such other & further relief as the defendant may in justice be entitled to.

THACHER & BANKS,
Att'ys for Iram Henshaw, Def't.

Afterwards, to wit, on the same day, the following answer of Christian Knohler, one of the defendants in the above-entitled cause, was filed in the clerk's office of said court, which is in words as follows, to wit:

27 *Answer of Christian Knohler, defendant.*

District court, county of Douglas.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHALL ET AL., DEF'T.

The defendant Christian Knohler, for himself alone, answering the petition of the plaintiff in this cause filed, shows to the court:

I. For the first defense to the cause of action set out in the said petition the said defendant avers that there is a misjoinder of *of* parties, in this: that the defendant has not, nor never had possession of, nor made any claim to the northeast and southeast quarters of section seventeen, the northeast quarter of section twenty, and the west half *of* the southeast quarter of the northwest quarter of section twenty-one, all being in township thirteen south of range twenty-one, east of the sixth

principal meridian, Kansas, and in the said county of Douglas, in said State, it being three and three-fourths quarter sections (containing in the aggregate six hundred acres of land) mentioned and described in the said petition, nor any part thereof, and never in anywise has either directly or indirectly or unlawfully kept said plaintiff out of the possession of said premises hereinabove described or any part thereof; and the said defendant further says that the said defendant Iram Henshaw, W'm R. Reece, J. M. Reece, Frederick Whylal, Edward Hale, W'm Bryman, and Daniel Kraus, and neither of them has, and never had possession of, or made any claims to, the northeast quarter of the northwest quarter of section seventeen, township thirteen south, of range twenty-one east of the sixth principal meridian in Kansas, in said county, (containing forty acres of land,) one quarter of the quarter section of land mentioned and described in the plaintiff's' petition, nor any part thereof, and that they never, and neither of said defendants ever, in anywise, either directly or indirectly or unlawfully, kept said plaintiff out of the possession of the said premises last herein described, nor any part thereof. But the said defendant avers that he was, at the time of the commencement of this suit, and now is, in pos'session, solely and exclusively, of the said northeast quarter of the northwest quarter of said section twenty-one in said township and range, and claims the exclusive right to possess, and now has, and for a long time has had, in severalty and solely, the exclusive title in fee to the said last-described piece or parcel of land. Whereupon this defendant asks the court that the said petition be dismissed as to him, and that he be allowed to go without day, and for costs of suit.

II. For a second and separate defense to the said cause of action in said petition contained, the said defendant denies that he unlawfully withholds from said plaintiffs the possession of the premises mentioned in said petition or any part thereof.

III. For a third and further answer the defendant alleges that, at the time and times hereinafter mentioned, one Elias Smith was a citizen of the United States, over twenty-one years of age, and did not own three hundred and twenty acres of land within the State of Kansas or the United States, and never had the benefit of any preëmption act of Congress; that said Elias Smith entered in person, upon the northwest quarter of section twenty-one, in township thirteen south, of range twenty-one east of the sixth principal meridian in Kansas, a part of the land mentioned and described in said plaintiffs' petition, and there, on the 1st day of Feb'y, A. D. 1857, made settlement, by erecting a dwelling-house, and making other valuable improvements thereon, with a view to preëmpt the same under the act of Congress of Sept. 4th, 1841, and the acts extending and amendatory thereto; that, at said time of such settlement, said quarter section of quarter section of land was entirely unoccupied by any person or claimant whatever, and was open and subject to preëmption under said laws; that, thereafter and within the time prescribed by law, and on or about the 20th day of February, A. D. 1857, the said Smith went personally to the local land office of the Pawnee land district, within the limits of which said land was located, then located at Lecompton, in said county and Territory of Kansas, and duly made in writing, and offered and claimed the right to file his declaratory statement of his intention to so preëmpt said land in said land office, in said district, and was prevented from so doing, at that time, by the officers of said office, viz, by the register and receiver of said land office, and who refused to accept and

file said declaratory statement at that time, wrongfully alleging that said lands were not open to settlement and preëmption, they being Indian lands, which allegation was not true; that, thereafter, and at divers times and repeatedly, the said Smith went, as aforesaid,
32 to said land office, and duly made in writing and offered and claimed the right to file his said declaratory statement of his intention so to preëmpt, as aforesaid, said lands, and was then and there as often and repeatedly prevented from so doing by said officers of said land office in like manner as aforesaid, and that said Smith was so prevented from so filing his said declaratory statement, or any declaratory statement, of his intention to preëmpt said land, in said office, in like manner as aforesaid, until the 2d day of August, A. D. 1868, when the said Smith was allowed, by the consent of the said register and receiver, duly and according to law, to file in said office his declaratory statement of his intention so to preëmpt said land; that the said Smith, from the time of his said settlement, as aforesaid, so continued in possession of, and continued to reside on, said premises, and in good faith made extensive and valuable improvements thereon up to the 22d day of January, A. D. 1861, when said Smith duly and according to law preëmpted
33 the same, and paid therefor the minimum Government price, namely, one dollar and one quarter, in a military land warrant number 77497, and received a certificate from the said officers of the said land office of the location thereof, on the said northwest quarter of said section twenty-one, in township thirteen, of range twenty-one, and then and there preëmpted said quarter section, and received from said officers a certificate, duly executed according to law, of his preëmption of said land in his favor, and that said preëmption, so as aforesaid, had and made by him, was thereafter, by the Commissioner of the General Land Office at Washington, duly approved and confirmed in favor of said Smith, and thereafter a patent therefor duly issued by the Government of the United States' said General Land Office to the name of said Smith; that the said Smith continued to reside on said premises, and to make valuable impovements on the same up to the day of ,
33½ A. D. 1866, when he sold, and for value received, and by good and sufficient deed, to one Cohn conveyed, and the said defendant, for full value paid thereafter, bought of the said Cohn all of the right, title, and interest of the said Cohn in and to the said northeast quarter of the northwest quarter of the said section twenty-one, and immediately took possession of the same, and has ever since resided on the same, and has continued to make improvements and pay the taxes thereon to the present time, and that his said improvements so as aforesaid made, and now on said premises and owned by said defendants, are of the value of one thousand dollars; that the same were made thereon by the occupying claimants, being in quiet possession of said premises, after a settlement made bona fide; that at the time of said settlement and filing on said preëmption by said Elias Smith, as aforesaid, on said quarter section of land, Wyandotte float or reserve number , issued to Irwin P. Long, under which the plaintiffs in this case claim, was
34 not and never had been located *nor* according to law on the said land and no part thereof thereon, duly or otherwise, been reported to the surveyor general of said land district, nor to the commissioner of said land office, nor to the Land Department at Washington, D. C., according to the requirements of law or the rules of said department. But that after said Smith had so settled, improved, and filed upon said quarter section of land, as hereinbefore set forth, and preëmpted the same, and acquired a vested right therein, and in good faith made im-

provements thereon as aforesaid, and on or about the day of , 186 , the said Wyandotte float was fraudulently attempted to be located, and was, through the frauds, connivances, and falsehoods of the parties owning the same, located upon lands covering and including said premises so claimed and occupied by the defendant; that said location of said float was, and was procured by said parties interested in the same to be, fraudulently antedated; that at a subsequent
35 period, by means to this defendant unknown, a patent was procured to be issued to said Iram P. Long from the Government of the United States for six hundred and forty acres of land, embracing therein and including the said piece and parcel of land so as aforesaid settled upon and preëmpted by said Smith, and sold to and now owned by this defendant as aforesaid; that said patent was procured by false and fraudulent*lent* representations to the officers of the Government of the United States in this: that it was by the parties interested in said float represented that there was no prior legal claimant under the preëmption law to said premises; that the interest of the said Irwin P. Long in and to said float and the lands covered thereby, and in said patent, were by him conveyed, and that the same were then or thereafter duly conveyed or transfer'ed to said plaintiffs, who now hold the title they have in said premises as trustees for this defendant, and
36 that the said float was laid and located as aforesaid by the plaintiffs as the agents of, or in the name of, the said Long, they being the real owners of the float, and having knowledge and notice of the facts herein set forth at the time of the said location of said float, and that the said defendants nor the said Smith never had any knowledge or notice whatever, either actual or constructive, of any location, or laying of *l*aid float on said land, nor any claim by said plaintiffs to said land in anywise whatever. Wherefore the said defendant prays judgment and decree of the court that said case be dismissed as against this defendant; that the said defendant holds the right to and the equitable title to the said premises so settled upon by said Smith and claimed by said defendant, and that the plaintiffs' title thereto is held by them on trust for this defendant, and that said plaintiffs execute a proper and sufficient conveyance of the same to said defendant, of which for
37 ten days' said decree to operate as said conveyance, or for such other and further relief as the defendant may in justice be entitled to.

THACHER & BANKS,
Att'ys fo' Plaintiff Christian Knohler.

And afterwards, to wit, on the same day, the following answer of W'm R. Reece, one of the defendants in the above-entitled cause, was filed in the clerk's office of the said court; which is in words as follows, to wit:

Answer of W. R. Reece.

District court, county of Douglas, Kansas.

JOHN MCALPIN ET AL., PL'FF',
vs.
IRAM HENSHAW ET AL., DEF'TS.

The defendant W'm R. Reece, for himself alone, for answer to
38 the plaintiffs' petition in this action, denies each and every allegation set forth in the said complaint, except that he entered into that part of the premises mentioned and described therein, viz, the east

half of the northeast quarter of section twenty, township thirteen, range twenty-one, at the time therein stated; and he avers that he did so as the tenant, and in subordination to the title of one Fred. Thomas, who was then, and for a long time before had been, and has ever since continued to be, and now is, the sole and exclusive owner in fee of the same; but he denies as to any other part or parcel of said premises, that he has, or ever claimed to have, any right, title, interest, or possession; and denies that he unlawfully withholds said plaintiff from the possession of the same or any part thereof; but that he has entirely removed from the premises mentioned and described in the petition, and now disclaims entirely having any interest therein.

THACHER & BANKS,
Att'ys for Pl'ff, W'm Reece.

39 Afterwards, to wit, on the same day, the following answer of J. M. Reece, one of the defendants in the above-entitled cause, was filed in the clerk's office of said court; which is in words as follows, to wit:

Answer of J. M. Reece.

District court, county of Douglas, Kansas.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET ALS., DEF'TS.

The defendant J. M. Reece, for himself alone, and for answer to the plaintiffs' petition in this action, denies each and every allegation set forth in the said complaint, except that he entered into that part of the premises mentioned and described therein, viz, the southeast quarter of section seventeen, township thirteen, range twenty-one, at the time therein stated; and as to that, he avers that he did *do* as the
40 tenant, and in subordination to the title of Frederick Whyble, defendant in this action, who was then, and for a long time before had been, and has ever since continued to be, and now is, the sole and exclusive owner in fee of the same; but he denies, as to any other part and parcel of said premises, that he has, or ever claimed to have, any right, title, interest, or possession; and denies that he unlawfully with-'olds said plaintiffs from the possession of the same or any part thereof.

THACHER & BANKS,
Att'ys for Def't, J. M. Reece.

Afterwards, to wit, on the same day, the following answer of Frederick Whytle, one of the defendants in the above-entitled cause, was filed in the clerk's office of said court, and is in words as follows, to wit:

41 *Answer of Fred'k Whytal, def't.*

District court, county of Douglas, Kansas.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET ALS., DEF'TS.

The defendant, Frederick Whybal, for himself alone, answering the petition of the plaintiffs in this case filed, shows to the court:

I. For a first defense to the cause of action set out in the petition,

the said defendant avers that there is a misjoinder of parties in this: that this defendant has not, and never had, possession of or made any claim to the northeast quarter of section seventeen, the northeast quarter of section twenty, nor the northeast quarter of section twenty-one, all being in township thirteen south of range thirteen east of the sixth principal meridian, in Kansas, and in the said county of Douglas, it being three quarter sections, containing in the aggregate four hundred and eighty acres of land, mentioned and described in the said
42 petition of plaintiffs, nor any part thereof; and never, in anywise, had, directly or indirectly, or unlawfully, kept the said plaintiffs out of possession of said premises herein described, or any part thereof; and the said defendant further says, that the said defendants, Iram Henshaw, Christian Knohlet, W. R. Reece, Edward Hale, William Bryman, & Daniel Kraus, and neither thereof, has, and never had, possession, or made any claim to the southeast quarter of section sixteen, township thirteen south, range twenty-one east of sixth principal meridian, in Kansas, in said county, containing one hundred and sixty acres of land, mentioned and described in plaintiffs' petition, nor any part thereof; and that they never, and neither of said defendants ever, in anywise, either directly or indirectly, or otherwise, kept said plaintiffs out of possession of said premises last therein described, nor any part thereof; but the said defendant avers that he was, at the time of the commencement of this suit, and now is, in possession, solely and exclusively, of the said southeast quarter of section seventeen, in said
43 township and range, and claims the exclusive right to possess, and now has, and for a long time has had, in severalty and solely, the exclusive title in fee to the said last-described piece or parcel of land, except that the said defendant, J. M. Reece, is a tenant thereon under him.

Wherefore this defendant asks the court for a judgment that this petition be dismissed as to him, and that he be allowed to go without day, and for costs of suit.

II. For a second and separate defense to the said cause of action in said petition contained, the said defendant denies that he unlawfully with'olds from said plaintiffs the possession of the premises mentioned in said petition, or any part thereof.

III. For a third and further answer, the said defendant alleges that at the time and times hereinafter mentioned, one James Whaley was a citizen of the United States, over twenty-one years of age, and did not own three hundred and twenty acres of land within the State of
44 Kansas, nor within the United States, and never has had the benefit of any prëemption act of Congress; that said James Whaley entered in person upon the southeast quarter of section seventeen, township thirteen, range twenty-one, east of the sixth principal meridian of Kansas, a part of the land mentioned and described in said plaintiffs' petition; and there, on the 5th day of February, A. D. 1857, made settlement by erecting a dwelling-house, and making other valuble improvements thereon, with a view to preëmpt the same under the act of Congress of Sept. 4th, 1841, and the acts extending and amendatory thereto; that at the said time of such settlement, said quarter section was entirely unoccupied by any person or claimant whatever, and was open and subject to preëmption under said law; that thereafter, and within the time prescribed by law, and on or about the 10th day of February, A. D. 1857, the said Whaley went personally to the land office of the Pawnee land district, within the limits of which the said land was situated, then located at Lecompton, in said county, and

45 Territory of Kansas, and duly made in writing, and offered and claimed the right to file, his declaratory statement, so to preëmpt said land in said land office, in said district, and was prevented from so doing at that time by the officers of said office, viz, the register and recorder of said land office, and who refused to accept and file said declaratory *said declaratory* statement at that time, wrongfully alleging that the said lands were not open for settlement and preëmption, they being Indian lands, which allegation was not true; that thereafter, and at divers times, and repeatedly, the said Whaley went to said land office and duly made, in writing, and offered and claimed the right to file, his declaratory statement of his intention so to preëmpt, as aforesaid, said lands, and was then and there as often and repeatedly prevented from so doing by said officers of said land office, in like manner as aforesaid, and that said

46 Whaley was so prevented from filing his declaratory statement of his intention to preëmpt said land in said office by said officers, in like manner as aforesaid, until the 30th day of July, A. D. 1858, when the said Whaley was allowed, by the consent of the said register and receiver, duly and according to law, to file his declaratory statement of his intention so to preëmpt said land; that the said Whaley, on the 5th day of March, 1859, duly and according to law preëmpted the same, and paid therefor the minimum price, namely, one dollar and one-quarter per acre, in a military land warrrant, No. 44879, and received a certificate from the said officers of said land office of the location thereof, on the said southeast quarter of said section seventeen, and then and there preëmpted said quarter section of land, and received from said officers a certificate, duly executed according to law, of his said preëmption of said land, in his favor, and that said preëmption, so as aforesaid had and made by him, was thereafter, by the Commissioner

47 of the Land Office, at Washington, duly approved and confirmed in favor of the said Whal*l*ey, and thereafter a patent therefor duly issued by the Government of the United States from said General Land Office to the name of said Whaley; that said Whaley continued to reside on said premises, and to make valuable improvements on the same up to the day of , 186 , when he sold to said defendant, and the said defendant for its full value paid, bought all the right, title, and interest in and to the said quarter of land of the said James Whaley, and immediately took possession of the same, and has ever since resided upon, and now is in possession and occupancy of, and now resides on the same, and has continued to make improvements and pay the taxes thereon to the present time, and that his said improvements, so as aforesaid made & now on said premises, and owned by said defendant, are of the value of one thousand dollars; that the same were made thereon by the occupying claimant, being in quiet possession of said

48 premises after a settlement made bona-fide; that at the time of said settlement on and preëmption by the said James Whaley, as aforesaid, of said quarter section of land, Wyandotte float, No. , issued to one Irwin P. Long, under which the plaintiffs in this case claim, was not nor ever had been located, nor according to law, on the said land, nor no part thereof, *nor had no part thereof*, nor had any location thereof, duly or otherwise, been reported to the surveyor general of said land district, nor to the Commissioner of the General Land Office, nor to the Land Department at Washington, D. C., according to the requirements of law or the rules of the said department; but that after the said Whaley had so settled, improved, and filed upon said quarter section of land, as hereinbefore set forth, and preëmpted the same, and acquired a vested right therein, and in good faith made improvements thereon,

as aforesaid, and on or about the day of , 186 , the said Wyandotte float was fraudulently attempted to be located, and was, by the fraud, connivance, and falsehood of the parties owning the same,
49 located upon land including and covering the said premises so claimed and occupied by the defendant; that said location of said Wyandotte float was in violation of law and in derogation of the vested rights of said Whaley and of said defendant; that the said location of said float was, and was procured to be by said parties interested in the same, fraudulently antedated; that at a subsequent period, by means to this defendant unknown, a patent was procured to be issued to said Irwin P. Lond, from the Government of the United States, for six hundred and forty acres of land, embracing therein and including the said piece and parcel of land so as aforesaid settled upon and preempted by said Whaley, and sold to and now owned by this defendant, as aforesaid; that said patent was procured by false and fraudulent representations to the officers of the Government of the United States, in this: that it was by the parties interested in said float represented that there was no prior legal claimant under the preëmption law to the said premises; that the interest of the said Irwin P. Long in
50 and to the said float, and the land covered thereby, and in said patent, were by him conveyed, and that the same were there or thereafter duly conveyed to said plaintiffs, who now hold the title they have in said premises as trustees for this defendant; and that the said float was laid and located as aforesaid, as the agents of or in the name of the said Long, they being the real owners of said float, and knowledge and notice of the facts herein set forth; and that the said defendant, nor said Whaley, never had any notice or knowledge whatever, either actual or constructive, of any location or laying of said float on said land, nor *or* any claim by said plaintiffs to said land, in anywise whatever.

Wherefore said defendant prays judgment and decree of court that the said case may be dismissed as against this defendant; that the said defendant holds the right and equitable title in and to the said premises so settled upon by said Whaley, and that the plaintiffs' title
51 thereto is held by them in trust for this defendant, and that said plaintiff execute a proper and sufficient conveyance of the same to said defendants, in default of which for ten days said decree to operate as such conveyance, or for such other and further relief as the defendant may in justice be entitled to.

THACHER & BANKS,
Att'ys for def't Whylal.

Afterwards, to wit, on the same day, the following answer of Edward Hale, one of the defendants in the above-entitled cause, was filed in the clerk's office of the said court, which is in words as follows, to wit:

Answer of Ed. Hale, def't.

District court, county of Douglas, Kansas,

JOHN MCALPIN ET AL.
vs.
IRAM HENSHAW ET AL.

The defendant Edward Hale, for himself, answering the peti-
52 tion of the plaintiffs, in this case filed, shows to the court—

I. For a first defense to the cause of action the said defendant

avers that there is a misjoinder of parties, in this: that this defendant has not nor never had possession of, or made any claim to, the east half of section seventeen, the northeast quarter of section twenty-one; all being in township thirteen south of range twenty-one east of the sixth principal meridian in Kansas, and in the said county of Douglas in said State; it being three and a half quarter sections, (containing in the aggregate five hundred and sixty acres of land,) mentioned and described in the said petition of plaintiffs, nor any part thereof, and never in anywise has either directly or indirectly or unlawfully kept the said plaintiffs out of the possession of the said premises hereinabove described, or any part thereof, and the said defendant further says that the said defendants, Iram Henshaw, Christian Knohlet, Wm. R. Reese, I. W. Reese,
Frederick Whytal, Wm. Bryman, and Daniel Kraus, and neither
53 thereof, has nor never had possession of or made any claim to the south half of the northwest quarter of said section twenty-one, (containing eighty acres of land,) a part of one of the pieces and parcels of land mentioned and described in said plaintiffs' petition, nor any part thereof, and that they never and neither of said defendants ever in anywise, either directly or indirectly or unlawfully, kept said plaintiffs out of the possession of said premises last herein described, nor any part thereof. But the said defendant avers that he was at the time of the commencement of this suit, and now is, in the possession solely and exclusively of the south half of the northwest quarter of section twenty-one, township thirteen, range twenty-one, in said county, and claims the exclusive right to possess, and now has and for a long time has had, in severalty and solely, the exclusive title in fee to the said last-described fourth of a quarter section of land.

Wherefore this defendant asks the court for a judgment that this petition be dismissed as to him, and that he be allowed to go with-
54 out day and costs of suit.

II. For a second and separate defense to said cause of action in said petition contained, the said defendant denies that he unlawfully with'olds from the said plaintiffs the possession of said premises mentioned in said petition, or any part thereof.

III. For a third and further answer, said defendant alleges that at the time and times hereinafter mentioned, one Elias Smith was a citizen of the United States, over twenty-one years of age, and did not own three hundred and twenty acres of land within the State of Kansas or *of* the United States, and never had had the benefit of any preëmption act of Congress of said United States; that said Elias Smith entered in person upon the northwest quarter of section twenty-one, township thirteen, range twenty-one east of the sixth principal meridian in Kansas, being
a part of the land mentioned and described in the plaintiffs' pe-
55 tition, and there, on the 1st day of February, A. D., 1857, made settlement by erecting a dwelling-house and making other valuable improvements thereon, with a view to preëmpt the same under the act of Congress of September 4th, 1841, and the acts extending and amendatory thereto. That at said time of such settlement said quarter section of land was entirely unoccupied by any person or claimant whatever, and was open and subject to preëmption under said law. That thereafter and within the time prescribed by law, and on or about the 20th day of February, A. D. 1857, the said Elias Smith went personally to the local land office of the Pawnee land district, within the limits of which said land was situated, and then located at Lecompton, in said county, and Territory of Kansas, and duly made in writing, and offered and claimed the right to file, his declaratory statement of his intention

so to preëmpt said land in said land office of said district, and was prevented from so doing at that time by the officers of said office, to wit, by the register and receiver of said land office, and who refused to accept and file said declaratory statement at that time, wrongfully
56 alleging that said lands were not open for settlement and preëmption; they being Indian lands, which allegation was not true. That thereafter and at divers times and repeatedly the said Smith went in person to said land office and duly made, in writing, and offered and claimed the right to file, his declaratory statement of his intention so *so* to preëmpt as aforesaid said land, and was then and there as often and repeatedly prevented from so doing by said officers of said land office, in like manner as aforesaid; and that said Smith was so prevented from filing his declaratory statement of his intention to preëmpt said land in said office by said officers of said office, in like manner as aforesaid, until the 2d day of August, A. D., 1858, when the said Smith was allowed, by the consent of the said register and receiver, duly and according to law to file in said office his declaratory statement of his intention so to preëmpt said land. That the said Smith, from the time of his said settlement as aforesaid, so continued in possession of and continued to
57 reside on said premises, and in good faith made extensive and valuable improvements thereon, up to the 22d day of January, A. D. 1861, when the said Smith duly and according to law preëmpted the same and paid therefor the minimum Government price, namely, one dollar and one quarter per acre, in a military land warrant, No. 77497, and received a certificate from the said officers of said land office of the location thereof on the said northwest quarter of section twenty-one, and then & there preëmpted the said quarter section of land, (containing one hundred and sixty acres,) and received from said officers a certificate, duly executed according to law, of his said preëmption of said land in his favor, and that said preëmption so as aforesaid had and made by him was, thereafter, by the Commissioner of the General Land Office at Washington duly approved and confirmed in favor of said Smith, and thereafter a patent therefor, duly issued by the United States Government from said General Land Office, to the name of said Smith.

That the said Smith continued to reside on said premises, and
58 to make valuable improvements on the same, up to the day of , 186 , when he sold and conveyed to one Veale, grantor of said defendant, and the said defendant for its full value paid, bought all the right, title, and interest in and to the said south half of the northwest quarter of said section twenty-one, which said Elias Smith so conveyed to the said Veale, of the said Veale, and immediately took possession of the same, and has ever since resided upon, and is still in possession and occupancy, and now resides on the same, and has continued to make improvements and pay the taxes thereon to the present time, and that his said improvements so as aforesaid made, are now on said premises, and owned by said defendant, are of the value of hundred dollars. That the same were made thereon by the occupying claimant, being in quiet possession thereof after a settlement made thereon bona fide. That at the time of the said settlement, filing, and preëmption of the said Smith, as aforesaid, of said quarter section of land, Wyandotte float or reserve, No. , issued to one Ir-
59 win P. Long, under which the plaintiffs claim in this case, was not, nor never had been located, nor according to law, on the said land nor no part thereof, nor had any location thereof been duly or otherwise reported to the surveyor general of said land district, nor to the Commissioner of the General Land Office, nor to the Land Department at Washington, D. C., according to law or the rules of said department.

But that after the said Smith had so settled, improved, and filed upon said quarter section of land as hereinbefore set forth, & preëmpted the same, and acquired a vested right therein, and in good faith made improvements thereon as aforesaid, and on or about the day of , 186 , the said Wyandotte float was fraudulently attempted to be located, and was through the fraud, connivance, and falsehood of the parties owning the same located upon lands including and covering the said premises so claimed and occupied by the said defendant. That said location of said Wyandotte float was a violation of law, and in derogation of the vested rights of said Smith and said defendant.

That the said location of said float was, and was procured to be
60 by the said parties interested in the same, fraudulently antedated.

That at a subsequent period, by means to this defendant unknown, a patent was procured to be issued to said Irwin P. Long, from the Government of the United States, for six hundred acres of land, embracing therein and including the said piece or parcel of land so as aforesaid settled upon and preëmpted by said Smith, and so sold to and now owned by this defendant as aforesaid. That said patent was procured by false and fraudulent representations to the officers of the Government of the United States, in this, that it was represented by the parties interested in said float that there was no prior legal claimant under the preëmption laws to the said premises; that the interest of the said Irwin P. Long in and to the said float and the lands covered thereby and in said patent were by him conveyed, and that the same were thereafter duly conveyed and transferred to the said pl'ffs, who now hold the title they have in said premises as trustees for this defendant, and the said float was laid and located as aforesaid, by the said plaintiffs
61 as the agents of or in the name of the said Long, they being the real owners of said float, and had knowledge and notice of the facts herein set forth; and that the said defendant nor the said Elias Smith never had any knowledge or notice whatever, eith actual or constructive, of any location or laying of said float on said land, nor of any claim of the said plaintiffs to said land in anywise whatever.

Wherefore said defendant prays judgment and decree of the court that the said case be dismissed as against this defendant. That the said defendant holds the right to and equitable title to said premises so settled upon by said Smith, and that the plaintiffs' title thereto is held in trust for this defendant, and that said plaintiffs execute a proper and sufficient conveyance of the same to said defendant, in default of which for ten days said decree to operate as such conveyance, or for such other and further relief as the defendant may in justice be entitled to.

THACHER & BANKS,
Att'ys for def't Edward Hale.

62 Afterwards, to wit, on the same day, the following answer of W'm Bryman, one of the defendants in the above-entitled cause, was filed in the clerk's office of the above-entitled court, which is in words as follows, to wit:

Answer of W'm Bryman, defendant.

District Court, Douglas Co., Kansas.

JOHN MCALPIN ET AL., PL'FF,
vs.
IRAM HENSHAW ET AL., DEF'TS.

The defendant, William Bryman, for himself alone, answering the petition in this case filed, shows to the court:

I. For a first defense to the cause of action set out in said petition said defendant avers—

That there is a misjoinder of parties in this: that this defendant has not, and never had, possession of, or made any claim to the west half of
63 the northeast quarter of section seventeen, the southeast quarter of section twenty and the northwest quarter of section twenty-one, all being in township thirteen south, of range twenty-one east of the sixth principal meridian in Kansas, and in the said county of Douglas in said State, containing in the aggregate six hundred acres of land mentioned and described in the said petition of the plaintiffs, nor any part thereof, and never in anywise has ever, directly or indirectly or unlawfully, kept the said plaintiffs out of the possession of the said premises hereinbefore described, or any part thereof; and the said defendant further says, that the said defendants, Iram Hernshaw, Christian Knohlet, W'm R. Reece, J. M. Reece, Frederick Whyble, Edward Hale, and Daniel Kraus, and neither of them has, and never claimed to have, possession of the southeast quarter of the northeast quarter of section seventeen, township thirteen south, of range thirteen east of the sixth principal meridian in Kansas, containing forty acres of land, one of the pieces and parcels of land mentioned and described in said plaintiffs' peti-
64 tion, nor any part thereof, and that they never and neither of said defendants never in anywise, either directly or indirectly or unlawfully, kept the said plaintiffs out of the possession of the said premises last herein described, nor any part thereof. But the said defendant avers that he was at the time of the commencement of this suit, and now is, in the possession, solely and exclusively, of the said southeast quarter of the northeast quarter of said section seventeen in said township, and claims the exclusive right to possess, and now has, and for a long time has had, in severalty and solely, the exclusive title in fee to the said last-described piece or parcel of land.

Whereupon this defendant asks the court for a judgment that the said petition be dismissed as to him, and that he be allowed to go without day and for costs of suit.

II. For a second and separate defense to said plaintiffs' cause of action in said petition contained, the said defendant denies that he un-
65 lawfully with'olds from said plaintiff the possession of the premises mentioned in said petition, or any part thereof.

III. For a third and further answer, the defendant alleges that, at the time and times hereinafter mentioned, one Gentry Hern was a citizen of the United States, over twenty-one years of age, and did not own three hundred and twenty acres of land within the State of Kansas or the United States, and never had had the benefit of any preëmption act of Congress of the United States; that the said Gentry Hern entered, in person, upon the said northeast quarter of said section seventeen, township thirteen, range twenty-one east of the sixth principal meridian in Kansas, a part of the land mentioned and described in the said plaintiff's petition, and there, on the first day of March, A. D. 1857, made settlement by erecting a dwelling-house and making other valuable improvements thereon, with a view to preëmpt the same under the act of Congress of Sept. 4th, 1841, and the acts extending and amendatory thereto; that at such time of said settlement said quarter sec-
66 tion of land was entirely unoccupied by any person and claimant whatever, and was open and subject to preëmption under said laws; that thereafter, and within the time prescribed by law, and on or about the 25th day of March, A. D. 1857, the said Gentry Hern went personally to the local land office of the local land district within the

limits of which said lands were situated, then located at Lecompton, in said county, and Territory of Kansas, and duly made in writing, and offered and claimed the right to file, his declaratory statement of his intention so to preëmpt said land in said land office, in like manner as aforesaid, and that said Hern was so prevented by the register and receiver of said land office, and who refused to accept and file said declaratory statement at that time, wrongfully alleging that the said lands were not open for settlement and preëmption, they being Indian lands, which allegation was not true; that thereafter, and at divers times, and repeatedly, the said Hern went as aforesaid to said land office, and duly made in writing, and offered and claimed the right to file his said
67 declaratory statement of his intention so to preëmpt as aforesaid said land, and was then and there as often and repeatedly prevented from so doing by said officers of the said land office, in like manner as aforesaid, and that said Hern was so prevented from filing his said declaratory statement, or any declaratory statement of his intention to preëmpt said land in said land office by said officers of said land office, in like manner as aforesaid, until the 27th day of July, 1858, when the said Hern was allowed, by the consent of the said register and receiver, to file in said office his declaratory statement of his intention to preëmpt said land; that the said Hern, from the time of his said settlement as aforesaid, so continued in possession of, and continues to reside on said premises, and in good faith made extensive and valuable improvements up to the 31st day of , 1859, when said Hern, duly and according to law, preëmpted the same, and paid therefor the minimum Government price, namely, one dollar and one-quarter per acre, in a military land warrant, No. 72172, and received a certificate
68 from the said officers of the said land office, of the location thereof on the said northeast quarter of said section seventeen, and then and there preëmpted the said quarter-section of land, and received from the said officers a certificate, duly executed according to law, of his preëmption of said land, in his favor, and that said preëmption so as aforesaid had and made by him, was thereafter, by the Commissioner of the General Land Office at Washington, duly approved and confirmed in favor of the said Hern, and thereafter a patent therefor, duly issued by the Government of the United States from said General Land Office to the name of said Hern; that the said Hern continued to reside on the said premises and to make valuable improvements on the same up to the day of April, 1860, when he sold and conveyed the same to one W'm Carson, who thereafter sold and conveyed the same to said defendant, and the said defendant for its full value paid, bought all the right, title, and interest in and to the said quarter of the quarter section of land which the said Gentry Hern owned and sold
69 as aforesaid, and immediately took possession of the same, and has ever since resided on and now is in possession and occupancy of, and now resides on the same, and has continued to make improvements and pay the taxes thereon to the present time, and that his said improvements so as aforesaid made and now on said premises, and owned by said defendant, are of the value of thousand dollars; that the same were made thereon by the occupying claimant, being in quiet possession of said premises, after a settlement made thereon bona fide; that at the time of the said settlement, filing on, and preëmption by said Gentry Hern of said quarter section of land, Wyandotte float or reserve, number , issued to one Irwin P. Long, under which the plaintiffs in this case claim, was not, nor never had been, located, nor according to law on the said land, nor had any location thereof, thereon,

duly or otherwise, been reported to the surveyor general of the said land district, nor to the Commissioner of the General Land Office,
70 nor to the Land Department at Washington, D. C., according to the requirements of law or the rules of the said department, but that the said Hern had so settled, improved, and filed upon said quarter section of land, as hereinbefore set forth, and preëmpted the same, and acquired a vested right thereto, and in good faith, and made improvements thereon as aforesaid, and on or about the day of , 186 , the said Wyandotte float was fraudulently attempted to be located, and was, through the fraud, connivance, and falsehood of the parties owning the same, located upon lands including and covering the said premises so claimed and occupied by this defendant; that said location of said Wyandotte float was in violation of law and in derogation of the vested rights of said Hern and of this defendant; that the said location of said Wyandotte float was, and was procured to be by the parties interested in the same, fraudulently antedated; that at a subsequent period, by means to this defendant unknown, a patent was procured to be issued
71 to said Irwin P. Long from the Government of the United States for six hundred and forty acres of land, embracing and including therein the said piece or parcel of land so as aforesaid settled upon and preëmpted by said Hern, and sold to and now owned by this defendant as aforesaid; that said patent was procured by false and fraudulent representations to the officers of the Government of the United States, in this, that it was, by the parties interested in said float, represented that there was no prior legal claimant, under the preëmption law, to the said premises; that the interest of the said Irwin P. Long in and to the said float and the land covered thereby, and in said patent, were by him conveyed, and that the same were thereafter duly transfer'ed & conveyed to the said plaintiffs, who now hold the title they have in said premises as trustees for this defendant. And that the said float was laid and located as aforesaid by said plaintiffs as the agents of or in the name of the said Long, they being the real owners of said float,
72 and had knowledge and notice of the facts herein set forth, and that the said defendant nor the said Hern never had any knowledge or notice, either actual or constructive, of any location or laying of said float on said lands, nor of any claim by the said plaintiffs to said lands in anywise whatever. Wherefore, the said defendant prays judgment and decree of the court, that the said case be dismissed as against this defendant; that the said defendant holds the right to and the equitable title to the said premises so settled upon by said Hern, and that the plaintiffs' title thereto is held by them in trust for this defendant, and that the said plaintiffs execute a proper and sufficient conveyance of the same to the said defendant, in default of which for ten days said decree to operate as such conveyance, or for such other and further relief as the defendant may, in justice, be entitled to.

THACHER & BANKS,
Att'ys for W'm Bryman, def't.

73 Afterwards, to wit, on the same day, the following answer of Daniel Kraus, one of the defendants in the above-entitled cause, was filed in the clerk's office of said court, which is in words as follows, to wit:

Answer of Daniel Kraus, def't.

District court, county of Douglas, Kansas.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET AL'S, DEF'TS.

The defendant Daniel Kraus, answering alone the petition of the plaintiffs in this case filed, shows to the court:

1st. For a first defense to the said cause of action set out in the said petition, said defendant avers that there is a misjoinder of parties, in this, that the defendant has not nor never had possession of or made any claim to the east half and the southwest quarter of the northeast quarter of section seventeen, the northeast quarter of section twenty,
74 all being in township thirteen south, of range twenty-one east of the sixth principal meridian, in Kansas, and in the said county of Douglas, in said State, it being three and three-fourths quarter sections, containing in the aggregate six hundred acres of land mentioned and described in the said petition of the plaintiff, nor any part thereof, and never in anywise has either, directly or indirectly, or unlawfully, kept the said plaintiffs out of the possession of the said premises herein above described or any part thereof; and the said defendant further says, that the said defendants, Iram Henshaw, W'm R. Reese, J. M. Reese, Frederick Whyble, Edward Hale, and W'm Bryman, and neither of them, has and never had possession of, nor mad' any claim to the northwest quarter of the northeast quarter of section seventeen, township thirteen south of range twenty-one east of the sixth principal meridian in Kansas, in said county—forty acres of land—one of the pieces & parcels of land mentioned & described in the said plaintiffs' petition, nor any
75 part thereof, and that they never and neither of said defendants ever in anywise, either directly or indirectly or unlawfully, kept the said plaintiffs out of the possession of the said premises last herein described, nor any part thereof; but the said defendant herein avers that he was at the time of the commencement of this suit, and now is, solely and exclusively in possession of the said northwest quarter of the northeast quarter of said section seventeen, in said township, & claims the exclusive right to possess, & now has & for a long time has had, in severalty & solely, the exclusive title in fee to the said last-described fourth of said quarter section of land.

Wherefore this defendant asks the court for a judgment that the said petition be dismissed as to him, and that he be allowed to go without day, and for costs of suit.

2d. And for a second and separate defence to said cause of action in said *in said* petition contained, the said defendant denies that
76 he unlawfully with'olds from said plaintiffs the possession of the said premises mentioned in said petition, or any part thereof.

3d. For a third and further answer the defendant alleges that at the time and times hereinafter mentioned, one Gentry Hern was a citizen of the United States, over twenty-one years of age, and did not own three hundred and twenty acres of land within the State of Kansas or the United States, and had never had the benefit of any preëmption act of Congress of the United States. That said Gentry Horn entered in person upon the northeast quarter of said section seventeen, township thirteen, range twenty-one east of the sixth principal meridian in Kansas, a part of the land mentioned and described in the plaintiffs' petition, and

thereon, on the first day of March, A. D. 1857, made settlement, by erecting a dwelling-house and making other valuable improvements thereon
with a view to preëmpt the same under the act of Congress of
77 Sept. 4th, 1841, and the acts extending and amendatory thereto;
that at said time of such settlement said quarter section of land was entirely unoccupied by any person or claimant whatever, and was open and subject to preëmption under said laws. That thereafter and within the time prescribed, and on or about the 20th day of March, A. D. 1857, the said Gentry Hern went personally to the local land office of the Pawnee land district, within the limits of which said land was situated, then located at Lecompton, in said county, and Territory of Kansas, and duly made, in writing, and offered and claimed the right to file, his declaratory statement of his intention so to preëmpt said land in said land office of said district, and was prevented from so doing at that time by the officers of the said office, viz: by the register and receiver of said land office, and who refused to accept and file said declaratory statement
at that time, wrongfully alleging that the said lands were not
78 open for settlement and preëmption, they being Indian lands,
which allegation was not true; that thereafter and at divers times and repeatedly the said Hern went in person to said land office and duly made, in writing, and offered and claimed the right to file, his said declaratory statement of his intention so to preëmpt said land as aforesaid, and was then and there as often and repeatedly prevented from so doing by said officers of said land office, in like manner as aforesaid, until the 27th day of July, A. D. 1858, when the said Horn was allowed, by the consent of the said register and receiver, duly and according to law, to file his said declaratory statement of his intention so to preëmpt said land; that the said Hern, from the time of his said settlement as aforesaid, so continued in possession and continued to reside on said premises, and in good faith made extensive and valuable improvements thereon up to the 23d day of February, A. D. 1859, when the said Hern,
duly and according to law, preëmpted the same, and paid
79 therefor the minimum Government price, namely, one dollar and
one-quarter per acre, in a military land warrant, No. 72172, and received a certificate from the said officers of the said land district of the location thereof, on the northeast quarter of section seventeen, and then and there preëmpted said quarter section of land, and received from the said officers a certificate, duly executed according to law, of his said preëmption of said land, in his favor, and that said preëmption so as aforesaid had and made by him was thereafter, by the Commissioner of the General Land Office at Washington, duly approved and confirmed in favor of the said Hern, and thereafter a patent therefor duly issued by the Government of the United States from said General Land Office to the name of said Hern; that said Hern continued to reside on said premises, and to make valuable improvements on the same, up to the
28th day of February, A. D. 1859, when he sold and conveyed to
80 said defendant, and the said defendant for its full value paid,
bought all the right, title, and interest in and to the said northwest quarter of the northeast quarter of said section seventeen, of the said Gentry Hern, and immediately took possession of the same, & has ever since resided on, and is now in possession and occupancy of, and now resides on the same, and has continued to make improvements and pay the taxes thereon to the present time, and that his said improvements so as aforesaid made and now on said premises, and owned by said defendant, are of the value of thousand dollars; that the same were made thereon by the occupying claimants being in quiet possession

of said premises after a settlement made thereon bona fide; that at the time of the said settlement, filing on, and preëmption by the said Gentry Hern as aforesaid, of the said quarter section of land, Wyandott' float or reserve, issued to one Irwin P. Long, under which the plaintiffs in this case claim, was not and never had been located nor
81 according to law, on the said land, nor on no part thereof; nor had any location thereof thereon, duly or otherwise, been reported to the surveyor general of said land district, nor to the Commissioner of the General Land Office, nor to the Land Department at Washington, D. C., according to the requirements of law or the rules of the said Department, but that after the said Hern had so settled, improved, and filed upon said quarter section of land, as hereinbefore set forth, and preëmpted the same, and acquired a vested right therein, and in good faith made improvements thereon as aforesaid, and on or about the day of , 186 , the said Wyandotte float was fraudulently attempted to be located, and was, through the fraud, connivance, and falsehood of the parties owning the same, located upon lands including and covering the premises so claimed and occupied by this defendant; that said location of said Wyandotte float was in violation of law, and in derogation of the vested rights of said Hern and of said defendant; that said location of said float was, and was procured to be by
82 said parties interested in the same, fraudulently antedated; that at a subsequent period, by means to this defendant unknown, a patent was procured to be issued to said Irwin P. Long, from the Government of the United States for six hundred and forty acres of land, embracing therein and including the said piece or parcel of land, so as aforesaid settled upon and preëmpted by said Hern, and sold to, and now owned by, this defendant, as aforesaid; that said patent was procured by false and fraudulent representation to the officers of the Government of the United States, in this: that it was by the parties interested in said float represented that there was no prior legal claimant under the preëmption laws to the said premises; that the interest of the said Irwin P. Long in and to the said float, and the land conveyed thereby, and in and to the said patent, were by him conveyed, and that the same were thereafter duly conveyed and transfer'ed to the said plaintiffs, who now hold the title they have in said premises as
83 trustees for this , and that the said float was laid and located as aforesaid by the said plaintiffs, as the agents for and in the name of said Long, they being the real owners of said float, and had knowledge and notice of the facts herein set forth; and that the said defendant, nor the said Hern, never had any knowledge or notice whatever, either actual or constructive, of any location or laying of said float on said land, nor of any claim by the said plaintiff to said land in anywise whatever.

Therefore the said defendant prays judgment and decree of the court that the said case be dismissed as against this defendant; that the said defendant holds the right to, and the equitable title to, the said premises, so settled upon by said Hern, and that the plaintiffs' title thereto is held by them in trust for this *plaintiff*, and that said plaintiffs execute a proper and sufficient conveyance of the same to said defendant, in default of which for ten days said decree to operate as such
84 conveyance; or for such other and further relief as the defendants may, in justice, be entitled to.

THACHER & BANKS,
Att'ys for Dan'l Kraus.

Afterwards, to wit, on the 20th day of April, A. D. 1865, the following replication to the answer of Iram Henshaw was filed in the clerk's office of said court, which is in words as follows, to wit:

Replication.

JOHN MCALPINE ET AL., PL'FF',
vs.
IRAM HENSHAW ET AL., DEF'TS.

And now come the plaintiffs, by Wilson Shannon, their attorney, and for repliclation to the first and third answers of the said Iram
85 Henshaw, defendant, say that they deny each and every material allegation contained in the first and third answers of the said Iram Henshaw, and this the said plaintiffs pray may be inquired of by the country.

WILSON SHANNON,
Att'y for Pl'ffs.

Afterwards, to wit, on the same day, the following replication to the answer of Christian Knolter was filed in the clerk's office of said court, which is in words as follows, to wit:

Replication.

JOHN MCALPIN ET AL'S, PL'FFS,
vs.
CHRISTIAN KNOHLTER ET ALS., DEF'TS.

And now come the said plaintiffs, by their attorney, Wilson Shannon, and for replication to the first and third answers of the said Christian Knohlter, defendant, say that they deny each and every material
86 allegation contained in the said first and third answers of the said defendant, and this the said defendants pray may be inquired of by the country.

WILSON SHANNON,
Att'y for Pl'ffs.

Afterwards, to wit, on the same day, the following replication to the answer of J. M. Reese was filed in the said clerk's office of the said court, which is in words as follows, to wit:

Replication.

JOHN MCALPIN ET AL'S, PL'FFS,
vs.
J. M. REESE ET AL., DEF'T'.

And now come the said plaintiffs, by Wilson Shannon, their attorney, and for replication to the answer of J. M. Reese, say that they deny each and every material allegation contained in the said answer
87 of said defendant, and this the plaintiff prays may be inquired of by the country.

WILSON SHANNON,
Att'y for Pl'ffs.

Afterwards, to wit, on the same day, the following replication to the answer of Frederick Whyble was filed in the clerk's office of the said court, which is in words, as follows, to wit.

Replication.

JOHN MCALPIN ET AL., PL'FFS,
vs.
FRED'K WHYBLE , DEF'TS.

And now comes the said plaintiffs, by their attorney, Wilson Shannon, and for replication to the first and third answers of the said Frederick Whyble, says that he denies each and every material allegation contained in the first and third answer of the said defendant, and this the said plaintiffs pray may be inquired of by the country.

WILSON SHANNON,
Att'y for Pl'ffs.

88 Afterwards, to wit, on the same day, the following replication to the answer of Edward Hale was filed in the clerk's office of said court, which is in words as follows, to wit:

Replication.

JOHN MCALPIN ET AL., PL'FFS,
vs.
EDWARD HALE ET AL., DEF'TS.

And now comes the said plaintiffs, by Wilson Shannon, their att'y, and for replication to the first and third answers of the said Edward Hale, defendant, say that they deny each and every material allegation contained in the said first and third answers of the said Edward Hale, and *of* this the said plaintiffs pray may be inquired of by the country.

WILSON SHANNON,
Att'y for Pl'ffs.

89 Afterwards, to wit, on the same day, the following replication to the answer of William Bryman, defendant, was filed in the clerk's office of said court, which is in words as follows, to wit.

Replication.

JOHN MCALPIN ET AL., PL'FFS,
vs.
W'M BRYMAN ET AL., DEF'TS.

And now come the said plaintiffs, by Wilson Shannon, their att'y, and for replication to the first and third answers of the said W'm Bryman, defendant, say that they deny each and every material allegation contained in the first and third answer' of the said defendant, and this the plaintiffs pray may be inquired of by the country.

WILSON SHANNON,
Pl'ffs Att'y.

Afterwards, to wit, on the same day, the following replication to the

answer of Daniel Kraus, defendant, was filed in the clerk's office of said court, which is in words as follows, to wit:

90 *Replication.*

JOHN MCALPIN ET AL.
vs.
DANIEL KRAUS ET AL.

And now come the said plaintiffs, by Wilson Shannon, their att'y, and for replication to the first and third answer of the said Daniel Kraus, defendant, and say that they deny each and every material allegation contained in the said first and third answers of the said defendant, Daniel Kraus, and of this the said plaintiffs pray may be inquired by the country.

WILSON SHANNON,
Pl'ffs Att'y.

Afterwards, to wit, on the 24th day of May, A. D. 1865, the following motion of plaintiffs was filed in the clerk's office of the dist. court, which is in words as follows, to wit:

Motion to strike out.

STATE OF KANSAS,
Douglas County Dist. Court:

JOHN MCALPIN ET ALS., PL'FFS,
vs.
IRAM HENSHAW ET AL., DEF'TS.

91 And now come the said plaintiffs, by Wilson Shannon, their att'y, and moves the court to strike out so much of the several answers of the said defendants as sets up a misjoinder of defendants.

WILSON SHANNON,
Att'y for Pl'ffs.

Afterwards, to wit, on the 3d day of June, A. D. 1865, at the May term of said court, among others the following proceedings were had, to wit:

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET AL.
Civil action.

The motion of the plaintiffs to strike out so much of the several answers of the several defendants as sets up a misjoinder of defendants, came on to be heard by the court, and the arguments of counsel having been heard, as well for the plaintiffs as defendants, the court sus-
92 tained said motion, and order that so much of each of the several answers of the defendant, as sets up a misjoinder of defendants, be stricken out; to which the said defendants excepted.

Afterwards, to wit, on the 9th day of December A. D. 1865, and at the November term of said court, among others, the following proceedings were had, to wit:

JOHN MCALPIN ET AL., PL'FFS, } Civil action.
vs.
IRAM HENSHAW ET AL., DEF'TS. }

Now, this day, came the said pl'ffs, by Shannon & Shannon, their att'ys, and came also the said defendant, by their attorneys, Thacher and Banks, and thereupon this cause came on to be tried by the court, with the oral consent of all the parties in open court.

93 Whereupon the court, after hearing all the evidence in the case, as well for said defendant as for said pl'ffs, and the arguments of counsel, held the same under advisement.

Afterwards, to wit, on the 16th day of December, A. D. 1865, and at the November term of said court, the following proceedings were had, to wit:

JOHN MCALPIN ET AL., PL'FFS, } Civil action.
vs.
IRAM HENSHAW ET AL., DEF'TS. }

This cause having been held under advisement as heretofore, the court, after due consideration thereof, do find that the said defendants do unlawfully keep said plaintiffs out of possession of the following-described real estate, in manner and form as the said plaintiffs have in their said petition declared, to wit: the east half of section seven-

94 teen, (17,) containing three hundred and twenty acres of land, the northeast quarter of section twenty, containing one hundred and sixty acres, and the northwest quarter of section No. twenty-one, (21,) containing one hundred and sixty acres, containing in the aggregate six hundred and forty acres of land, all being in township thirteen (13) south of range No. 21 east of the sixth principal meridian, Kansas, all being and lying in one compact body, and situate in the county of Douglas, State of Kansas.

It is therefore considered and adjudged that the said plaintiffs do recover against the said defendants the said premises as above described, and also their costs in and about their suit in this behalf expended, taxed at $.

And thereupon said defendants, by their attorneys as aforesaid, entered notice of their intention to demand and have a new trial in this action.

On consideration whereof, it is ordered that the judgment, as

95 above entered, be, and the same is hereby, vacated, and that the cause shall stand for another trial at the next term of this court.

And afterwards, to wit, on the 28th day of May, A. D. 1866, at the May term of said court, among others the following proceedings were had, to wit:

JOHN MCALPIN ET ALS., PL'FFS, } Civil action.
vs.
IRAM HENSHAW ET AL., DEF'TS. }

And now come the said pl'ffs, by their attorney, Gov. Shannon, and the defendants, by their attorneys, Thacher & Banks; and, on their oral consent now given in open court, it is ordered that this action be

referred to Hon. Nelson Cobb, to hear and determine the same as aforesaid, and that the said referee report his determination at the next term of this court, or personally to the clerk thereof.

96 And afterwards, to wit, on the day of , A. D. 186 , the following answer of Mahlon Stubbs was filed in the clerk's office of said court, and is in words as follows, to wit:

Answer of Mahlon Stubbs.

District court, county of Douglas, Kansas.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET AL., DEF'TS.

The defendant, Mahlon Stubbs, appears in this action, and for answer to the petition of plaintiffs, shows to this court—

1st. That he denies each and every material allegation in said petition contained not herein specifically admitted.

2d. For a further answer the defendants alleges that, at the time and times hereinafter mentioned, one Elias Smith was a citizen of the
97 United States, over twenty-one years of age, and did not own three hundred and twenty acres of land therein, and never had had the benefit of any preëmption law thereof; that he entered in person upon the northwest quarter of section twenty-one, township thirteen south, of range twenty-one east of the sixth principal meridian in Kansas, a part of the land mentioned in the petition, and there, on or about the first day of February, A. D. 1857, made settlement by erecting a dwelling-house and making other valuable improvements thereon, with a view to preëmpt the same under the act of Congress of September 4th, 1841, and the acts extending and amendatory thereto; that said land was then entirely unoccupied by any person or claimant, and that thereafter, and within the time prescribed by law after the same land became subject to preëmption and settlement, and under said law, and on or about the 2d day of August, A. D. 1858, the said Smith was allowed to, by the register and receiver of the local land office for the land
98 district in which such land was situated, and did, file in said office his declaratory statement of his intention so to preëmpt said land; that the said Smith, from the time of his said settlement as aforesaid, so continued in possession of and continued to reside on the said premises, and in good faith made extensive and valuable improvements until the 22d day of January, 1861, when said Smith, duly and according to law, preëmpted the same, and paid therefor to the United States, the owner in fee thereof, the minimum Government price, namely, 1¼ dollars therefor, in a military land warrant, and received a certificate from the said United States, through its said officers and agents, of the location of said warrant on and sale of said northwest quarter of section twenty-one in said township, in said petition named, and then and there preëmpted the same according to law; and that his said preëmption so as aforesaid had and made by him was thereafter, by the said agents and officers of the Government of the United
99 States, duly ratified and confirmed, and a patent thereof and therefor duly ordered and executed; that said Smith continued to reside on and improve said premises, and to make valuable improvements on the same up to the day of , 1862, when he sold, and,

for value received, by good and sufficient deed, conveyed to one Cohn; and the said defendant thereafter, for its full value paid, bought of said Cohn all the right, title, and interest of the said United States, Smith, and Cohn in and to the said northwest quarter of the northwest quarter of said section twenty-one, and is now the owner thereof, and in possession thereof, and has ever since resided thereon; that the said plaintiffs, by means unknown to this defendant, and without his knowledge, fraudulently and contrary to law, obtained the patent of the United States for said land conveying, and they now hold the legal title thereto; that they hold the same in trust for this defendant; that this defendant has demanded a legal conveyance of the same of the said plaintiffs,
100 and to pay the expenses thereof, which was refused by said plaintiffs:

Wherefore defendant demands a decree that this defendant holds the equitable title thereto in trust for plaintiffs; that the said plaintiffs execute and deliver to this defendant a good and sufficient conveyance thereof, or that, in default thereof, *that* such decree stand as such conveyance, and for judgment for costs, or for such other and further decree as may be given.

THACHER & BANKS,
Att'ys for Def't Mahlon Stubbs.

Afterwards, to wit, on the day of , 186 , the following answer of J. Weaver, defendant, was filed in the clerk's office of said court, which is in words as follows, to wit:

Answer of J. Weaver.

District court, county of Douglas, Kans.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET AL., DEF'T'.

101 The defendant J. Weaver appears in this action, and for answer to the petition of the plaintiff, shows to the court—

1st. That he denies each and every material allegation contained in said petition not herein specifically admitted.

2d. And for a further answer said defendant alleges that, at the time and times hereinafter mentioned, one Gentry Hern was a citizen of the United States, over twenty-one years of age, and did not own three hundred and twenty acres of land therein, and never had had the benefit of any preëmption act of Congress thereof; that he entered in person upon the northeast quarter of section seventeen, (17,) township thirteen, (13,) range twenty-one (21) east of the sixth principal meridian, in Kansas, a part of the lands mentioned in the said petition, and there, on or about the February 1st, 1857, made settlement by erecting a dwelling-
102 house, and making other valuable improvements thereon, with a view to preëmpt the same under the acts extending and amendatory thereof. The said land was then entirely unoccupied by any person or claimant; and that thereafter, and within the time prescribed by law, after the said land became subject to preëmption and settlement under said law, and on or about the 20th day of August, 1858, the said Hern was allowed, by the register and receiver of the local land office for the land district in which said land was situated, and did, file in said office his declaratory statement of his intention so

to preëmpt said land; that the said Hern, from the time of his said settlement as aforesaid, so continued in possession of and continued to reside on said land, and in good faith made extensive and valuable improvements until the 22d day of January, A. D. 1861, when said Hern, duly and according to law, *duly* preëmpted the same, and paid therefor to the United States, the owner in fee thereof, the minimum Government price, namely, 1¼ dollars per acre *therefor*, in a military
103 land warrant, and received a certificate from the United States through its said agents and officers of the location of said warrant on, and sale of, said northeast quarter of said section seventeen in said township, in said petition mentioned, and then and there preëmpted the same according to law, and that his said preëmption so as aforesaid had and made by him was thereafter, by the said agents and officers of the Government of the United States, duly ratified and confirmed, and a patent therefor and thereof duly ordered and executed; that the said Hern continued to reside on and improve said premises, and to make valuable improvements on the same up to the day of , A. D. 1862, when he sold and, for value received, by good and sufficient deed, conveyed *conveyed* to this defendant, for its full value, all the right, title, and interest of the said United States in and to the said southwest quarter of the northeast quarter of said section seventeen, (17,) township thirteen, (13,) range twenty-one, (21,) and is now the owner
104 thereof, and in possession thereof, and has ever since resided thereon; that the said plaintiff, by means unknown to this defendant, and without his knowledge, fraudulently and contrary to law, obtained the patent for said land of the said United States, and they now hold the legal title to the same; that they hold the same in trust for this def't; that this defendant has demanded a legal conveyance of the same from the said plaintiffs, and to pay the expenses thereof, which was refused.

Wherefore defendant demands a decree that this defendant holds the equitable title to said land, and that said plaintiff holds the legal title thereto in trust for, and that said plaintiffs execute and deliver to this defendant a good and sufficient conveyance thereof, or that, in default thereof, *that* such decree stand as such conveyance, and for judgment for costs, or for such other and further decre as may be just.

THACHER & BANKS,
Att'ys for Def't J. Weaver.

105 Afterwards, to wit, on the day of , 186 , the following answer of Otis Richards, defendant, was filed in the clerk's office of the said court, which is in words as follows, to wit:

Answer of Otis Richards.

District court, county of Douglas, Kansas.

JOHN MCALPIN ET AL., PL'FF',
vs.
IRAM HENSHAW ET AL.

The defendant Otis Richards appears in this action, and for answer to the petition of the plaintiff shows to the court—

1st. That he denies each and every material allegation in said petition contained not herein specifically admitted.

2d. And for a further answer the defendant alleges that at the time

and times hereinafter mentioned one Gentry Hern was a citizen of the United States, over twenty-one years of age, and did not own
106 three hundred and twenty acres of land therein, and never had the benefit of any preëmption law thereof. That he entered in person upon the northeast quarter of section seventeen, township thirteen, of range twenty-one east of the sixth principal meridian in Kansas, a part of the land mentioned in the petition, and there, on or about the February 1st, 1857, made settlement, by erecting a dwelling-house thereon and making other valuable improvements thereon, with a view to preëmpt the same under the act of Congress of September 4, 1841, and the acts extending and amendatory thereto. That said land was then entirely unoccupied by any person or claimant, and that thereafter, and within the time prescribed by law, after said land became subject to preëmption and settlement under said law, and on or about the 20th day of August, 1858, the said Hern was allowed to, by the register and receiver of the local land office for the land district in
107 which such land was situated, and did, file in said office his declaratory statement of his intention so to preëmpt said land. That the said Hern from the time of his said settlement as aforesaid so continued in possession of and continued to reside on said premises, and in good faith made extensive and valuable improvements, until the 22d day of January, A. D. 1861, when said Hern, duly and according to law, preëmpted the same, and paid therefor to the United States, the owners in fee thereof, the minimum Government price, namely, 1¼ dollars per acre therefor, in a military land warrant, and received a certificate from the said United States, through its said agents and officers, of the location of said warrant on, and sale of, said northeast quarter of said section seventeen, in said petition named, and then and there preempted the same according to law, and that his said preëmption so as aforesaid had and made by him was thereafter, by the said agents and officers of the Government of the United States, duly ratified and
108 confirmed, and a patent thereof and therefor duly ordered and executed. That said Hern continued to reside on and improve said premises and to make valuable improvements on the same up to the day of , 1862, when he sold and, for value received, by good and sufficient deed, conveyed to one Carson, and the said defendant thereafter for its full value paid, bought of the said Carson all the right, title, and interest of the said Hern and Carson in and to the said northeast quarter of the said northeast quarter of said section seventeen, in township thirteen, of range twenty-one, and is now the owner thereof and in possession thereof and has ever since resided thereon. That the said plaintiffs, by means unknown to this defendant and without his knowledge fraudulently and contrary to law, obtained the patent of the United States for said land conveying, and they now hold the legal title thereto. That they held the same in trust for this defend-
109 ant and that this defendant has demanded a legal conveyance of the same of the said plaintiffs, and to pay the expenses thereof, which was by said plaintiffs refused.

Wherefore defendant demands a decree that this defendant holds the equitable title to said land, and that said plaintiffs hold the legal title thereto in trust for said defendant, and that said plaintiffs execute and deliver to this defendant a good and sufficient conveyance thereof or that in default thereof *that* such decree stand as such conveyance, and for judgment for costs, and for such other and further decree as may be just.

THACHER & BANKS,
Att'ys for Def't.

Afterwards, to wit, on the day of , the following replication to the answer of Stubbs, defendant, was filed in the clerk's office of said court, which is in words as follows, to wit:

110 *Replication.*

JOHN MCALPIN ET AL., PL'FF,
vs.
IRAM HENSHAW ET AL., DEF'TS.

And now comes the said plaintiffs and, for replication to the answer of Stubbs, say that they deny each and every material allegation contained in the answer of said defendant secondly above pleaded in his said answer, and this the said plaintiffs pray may be inquired of by the country.

WILSON SHANNON,
Att'ys for Pl'ffs.

Afterwards, to wit, on the day of , the following replication to the answer of Weaver, defendant, was filed in the clerk's office of said court, which is in words as follows, to wit:

Replication.

JOHN MCALPIN ET AL., PL'FF,
vs.
IRAM HENSHAW ET AL.

111 And now come the said plaintiffs and for replication to the answer of Weaver say that they deny each and every allegation contained in the answer of *the answer of* the said defendant secondly above pleaded in his said answer, and this the plaintiffs pray may be inquired of, &c.

WILSON SHANNON,
Att'y for Pl'ffs.

Afterwards, to wit, on the day of , the following replication to the answer of Oscar Richards was filed in the clerk's office of said court, and is in words as follows, to wit:

Replication.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET AL., DEF'TS.

And now comes the said plaintiffs, and for replication to the answer of Oscar Richards say that they deny each and every material
112 allegation contained in the answer of the said defendant secondly above pleaded in his said answer, and this the said plaintiffs pray may be inquired of by the country.

WILSON SHANNON,
Att'y for Pl'ffs.

Afterwards, to wit, on the trial of said cause before the referee,

the following agreement was filed before said referee, which is in words as follows, to wit:

District court, Douglas County, Kansas.

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET ALS., DEF'TS.

It is hereby agreed in open court that, so far as the title to the lands in question mentioned and described in the petition in this action are concerned, the whole case as to all of the defendants who
113 have appeared shall be tried and submitted on the evidence adduced relative to the southeast quarter of section seventeen, (17,) township thirteen, (13,) range twenty-one, (21,) east of the sixth principal meridian in Kansas, under the separate answer filed by Frederick Whyble, and that the decision of the question as to the title of all of the other pieces and parcels of land included in said petition of pl'ffs so far as the parties to this action are concerned.

It is also further agreed that the certificate of H. S. Sleeper, surveyor general of Kansas & Nebraska, dated November 2d, 1865, relative to the certificate of the surveyor general attached to the filed-notes of the survey of township No. 13 south, range No. 21 east of the sixth principal meridian in Kansas, shall be received in evidence as fully as though the facts therein contained had been testified to in a deposition and the said plat introduced in evidence.

THACHER & BANKS, *Att'ys for Def't.*
WILSON SHANNON, " " *Plff.*

114 Afterwards, to wit, on the 5th day of January, A. D. 1867, the following report of Nelson Cobb, referee, was filed in the clerk's office in said court, which is in words as follows, to wit:

District court, Douglas county, Kansas.

JOHN MCALPIN, MARY WALKER, AND ISAIAH Walker, pl'ffs,
vs.
IRAM HENSHAW, CHRISTIAN KNOLTER, W'M R. Reece, J. M. Reece, Frederick Whyble, Edward Hale, W'm Bryman, Daniel Kraus, Barkley Thomas, ——— Stubbs, J. Weaver, and Otis Richards, defendants.

To the district court fourth judicial district, Douglas county:

115 I, the undersigned referee, appointed by said court to try the above-entitled action, respectfully report—

That on the 10th day of September, 1866, the parties above named appeared before me at the office of Cobb and Chadwick, in Lawrence, Douglas County, the time and place fixed by me for said trial, the said plaintiffs appearing by Wilson Shannon, esq., and the said defendants by E. V. Banks, esq., their respective counsel; and said referee having been first duly sworn, proceeded to trial; and the said referee having heard the several proofs and allegations of the parties, and arguments of their said counsel, and duly considered the same, do find as the facts in said action—

That by the 4th article of the treaty between the United States and the Wyandotte nation of Indians, made at Upper Sundusky, in the State of Ohio, ratified on the 5th day of October, 1842, the United States agreed to grant to Irwin P. Long a section of land of six hundred and forty (640) acres, out of any lands west of the Missouri River set
116 apart for Indian use not already claimed or occupied by any person or tribe. That by the 9th article of that treaty with the same tribe, made and concluded on the 31st day of January, A. D. 1855, it was agreed by the United States that each of the individuals to whom reservations were issued by the article first aforesaid, or their heirs or legal representatives, should be permitted to select and locate said reservations on any Government land west of the State' of Michigan and Iowa, subject to preëmption and settlement, said reservations to be patented by the United States in the names of the reservees; and that the said reservees, except certain incompetant persons, should have the unrestricted right to sell and convey such lands.

That on the 8th day of May, A. D. 1857, Samuel Stover, a white man, as agent for said Long, filed in the office of the surveyor general of Kansas and Nebraska a written notice that he, as such agent, had that day selected and located the reserve of land of Long, under said
117 treaties, upon the land described in the plaintiffs' petition. That on the 17th day of Sept., 1857, notice was sent by the surveyor general of such location to the Department of the Interior.

That on the 30th day of May, A. D. 1861, a patent was executed by the United States, purporting to convey said lands to said Long, pursuant to said treaties, which was afterwards duly delivered.

That on the 6th day of Sept., A. D. 1861, the said Irwin P. Long duly conveyed an undivided two-thirds of said land to the plaintiff, Mary Walker. That on the same day said Long, by deed, conveyed an undivided third of said land to John McAlpin, the plaintiff.

That in the month of February, A. D. 1857, James Whaling, then being personally qualified to pre'mpt lands of the United States, entered upon and made settlement in person, and commenced to improve, with intent to preëmpt and purchase from the United States the south-
118 east quarter of section seventeen, (17,) township thirteen, (13,) of range twenty-one, (21,) in Douglas County, parcel of the land described in the said petition, and continued to reside thereon and to improve the same with such intention up to the time he purchased the same, as hereinafter stated.

That said Whaley, after making such settlement, within thirty days thereafter, went to the proper local land office, with intent to file notice of his said settlement and intention to preëmpt, and offered to make such filing; but the register of the land office refused to allow such filing, on the ground that the said land was not preëmp'able. That in April of the same year said Whaley went to the same office and made the same offer, which was refused by the register on the same grounds.

That on the 30th day of July, 1858, said Whaley duly filed in the office of the register of the said land office a notice of his settlement on said land, and of his intention to preëmpt the same, dating the time of his settlement July 28th, 1858. That on the 5th day of May,
119 1859, said Whaley purchased said land, and paid for the same with a military land warrant, No. 44879, and took the usual certificate of such purchase and payment. That on the 10th day of Aug., 1860, said preëmption and purchase was approved by the Commissioner of the General Land Office of the United States, and the register of the

local land office was duly notified, by letter of said Commissioner, of such approval.

That afterward the said Whaley applied to the register of said local land office, at his office, for a patent from the United States to him for said land, and was informed by said register that said patent had been sent from Washington to said office and afterwards recalled. That on the 8th day of July, 1864, the said James Whaley and his wife conveyed said land to the defendant, Frederick Whyble, by deed, in fee simple; and I further find that the defendant, Iram Henshaw, holds
the west half of the northeast quarter of section twenty of town-
120 ship thirteen of range *twenty* twenty-one, in said petition described, by and under a right derived from a preëmption & purchase in all respects similar to the preëmption and purchase aforesaid, to the said Whaley, to the said southeast quarter of said section seventeen, (17,) and his (Henshaw's) right under said purchase to the west half of the northeast quarter of said section twenty-one is, in all respects, the same as the right of said Whyble to said southeast quarter of said section seventeen, as above set forth, and none other.

That defendant, Edward Hale, holds the south half of the northwest quarter of section twenty-one, in said petition described, by rights similar, in all respects, to the aforesaid title of said Whyble.

That the defendant Christian Knolter holds the same right to the northeast quarter of the northwest quarter of said section twenty-one.

That the defendant Daniel Kraus holds the same right to the northwest quarter of the northeast quarter of said section seventeen.

121 That the defendant Mahlon Stubbs holds the northwest quarter of the northwest quarter of said section twenty-one by the same right.

That the defendant Weaver holds the southwest quarter of the northeast quarter of said section seventeen by the same right.

That the defendant Barclay Thomas holds the same right to the east half of the northeast quarter of said section twenty.

That the said defendant Otis Richards holds the same right to the northeast quarter of the northeast quarter of said section seventeen.

That said def't W'm Bryman holds the southeast of the northeast quarter of said section seventeen by the same right.

That each of the said defendants keep the plaintiffs out of the possession of that portion of said lands so held by him as aforesaid, and none other.

That the said defendant W'm R. Reece is, and at the commencement of
this action , in the occupancy of the east half of the northeast
122 quarter of said section twenty as the tenant of said defendant Thomas, and not otherwise, and kept an*k* keeps the plaintiff out of the possession thereof, and of none other.

That J. M. Reece, defendant, at the commencement of this action, was, and still is, in the occupancy of the southeast quarter of said section seventeen as tenant of the defendant Whyble, and not otherwise, and keeps the plaintiffs out of possession thereof, and none other.

That the lands in question are parcel of the lands ceded to the United States by the Shawnee tribe of Indians, by treaty, finally ratified with amendments, on November 2d, 1854, and lying between the Missouri State line and a line parallel thereto, and west of the same, thirty miles distant.

That said lands described in said petition were first open for settlement preëmption and sale by the United States Government, by order of

the President thereof, on the 9th day of July, A. D. 1858, of which
123 the said officers of the said local land office had due notice.

And I find, as matter of law, that up to the 9th day of July, A. D. 1858, neither the plaintiffs, nor the defendants, nor said Long had acquired any right, legal or equitable, in or to said land.

That up to the time of said purchase and payments, neither the plaintiffs nor said Long had acquired any right, legal or equitable, thereto; that by said purchase and payment so made as aforesaid on the 5th day of May, A. D. 1859, a perfect, equitable title to the said southeast quarter of said section seventeen vested in said James Whaley, and like titles at the same time vested to the several other purchasers of said land to the parcels so purchased by them respectively; that the said patent to said Long conveyed the legal title to said lands, subject to the equitable rights of those holding the equitable title under said preëmption and purchase, and the plaintiffs hold said legal title
124 to the southeast quarter of said section seventeen in trust for the defendant Whyble.

That the plaintiffs hold said title to the west half of the northeast quarter of said section twenty in trust for said defendant Iram Henshaw, and the east half of the same quarter section in trust for the defendant Barkley Thomas.

That said plaintiffs hold the said title to the south half of the northwest quarter of said section twenty-one in trust for said Edward Hale; the northeast quarter of the northwest quarter of said section twenty-one in trust for said Christian Knohlter, and the northwest quarter of the same quarter section in trust for said defendant Mahlon Stubbs, and the northwest quarter of the northeast quarter of said section seventeen in trust for said defendant Daniel Kraus; the southeast quarter of the northeast quarter of the same section in trust for said William Bryman, and the northeast quarter of the same quarter section in trust for defendant Otis Richards, and the southwest quarter
125 of the same quarter section in trust for said J. Weaver, defendant above-named.

And I do further find that the defendants are entitled to judgment; that the plaintiffs convey by deed to each of the defendants respectively who own such equitable titles, within thirty days after judgment; or in default thereof that the judgment stand for and have the force and effect of such conveyance, and that the defendants recover their costs.

All of which is respectfully submitted this 4th day of December, A. D. 1866.

N. COBB, *Referee.*

I hereby further certify that on trial the following witnesses for the defendants were in attendance, and entitled to fees, and their attendance and travel as follows, to wit:

Ira Robe was in attendance one (1) day from nine (9) miles distant.

James Whaley was in attendance two (2) days at different times, coming a distance of seven (7) miles each time.

126 John E. Campbell was in attendance twice; travel four (4) miles each way at each time, and two days' attendance in all.

W. H. Shreeves was in attendance twice; travel each time eleven (11) miles each way, and two days' attendance.

Ira Jennings was in attendance twice; first time came from Missouri; his travel within this State, coming first time (40) forty miles, and

within the county ten (10) miles each way; second time coming from Endora, seven (7) miles; attendance two (2) days.

Referee's fees thirty dollars.

N. COBB, *Referee.*

JOHN MCALPIN ET AL., PL'FFS,
vs.
IRAM HENSHAW ET AL., DEF'T.

And now comes the said plaintiffs, by Wilson Shannon, their attorney, and moves the court to set asid' the report of the Hon. Nelson
127 Cobb, referee, to whom this case has been referred, for the following reasons, to wit:

1st. That the finding of said report, as to the law existing and the facts found, by said referee is erroneous, and not authorized by said facts.

2d. That the said referee should have found the law of the case for the plaintiffs, and not for the defendants.

3d. That the said referee should have found the law of the case for the plaintiffs.

4th. That, on the report of the said referee, the said plaintiffs are entitled to judgment, and not said defendants, as reported by said referee.

5th. And for other errors appearing in said report.

WILSON SHANNON, *Att'y for Pltf's.*

128 Afterwards, to wit, on the 5th day of January, A. D. 1857, and at the November term of said court, among others, the following proceedings were had, to wit:

JOHN MCALPIN, MARY WALKER, AND ISAIAH Walker, pl'ffs,
vs.
IRAM HENSHAW, CHRISTIAN KNOHLTER, W'M R. Reece, J. M. Reece, Frederick Whyble, Edward Hale, W'm Bryman, Daniel Kraus, Barkley Thomas, Mahlon Stubbs, J. Weaver, and Otis Richards, defendants. } Civil action.

And now come the said plaintiffs, by Wilson Shannon, their attorney, and the said defendants, by Thacher & Banks, their attorneys, and the said defendant, on producing the report of N. Cobb, referee, duly appointed and sworn, heretofore made in this action under a former
129 order of this court, and the said defendant moving for judgment on said report, it is hereby ordered that the said report and all the matters and things therein contained do stand ratified and confirmed.

It is therefore considered by the court here that the said defendants do recover of the said plaintiffs their costs herein taxed at $.

And it is hereby further ordered and decreed that the said plaintiffs convey by deed, pursuant to the said report of the *defendant*, to Frederick Whyble the southeast quarter of section No. seventeen, (17;) and to W'm Bryman the southeast quarter of the northeast quarter said section seventeen, (17;) and to J. Weaver the southeast quarter of the northeast quarter of said section seventeen; and to David Kraus the northwest quarter of the northeast quarter of said *said* section seventeen; and to Otis Richards the northeast quarter of the northeast quarter of said sec-

tion seventeen; and to Iram Henshaw the *the* west half of the northeast quarter of said section No. (20,) twenty; and to Barkley Thomas
130 the east half of the said northeast quarter of said section No. twenty, (20;) and to Edward Hale the south half of the northeast quarter of said section twenty-one, (21;) and to Mahlon Stubbs the northwest quarter of the said northwest quarter of said section twenty, (21;) and to Christian Knohlter the northeast quarter of the said northwest quarter of said section twenty-one; said lands all being situated in township No. thirteen, in range No. twenty-one, (21,) in Douglas County, Kansas, according to the Government survey thereof, and being pieces and parcels of land described in said plaintiffs' petition, and that such deed be executed and delivered so as aforesaid within thirty days after the rendition of this judgment, or in default thereof that this judgment stand for and have the force and effect of such conveyances, respectively.

And the said plaintiffs, by Wilson Shannon, their attorney, excepts to the foregoing judgment and decree of the court on the ground that the same is not authorized by the law arising on facts found by said
131 referee, and on the ground that said judgment and decree is against law, and prays that his said exceptions be noted by the court; which is done accordingly.

Heretofore, to wit, on the same day, the following proceedings were had, to wit:

JOHN MCALPIN, MARY WALKER, AND ISAIAH Walker, her husband, pl'ffs, *vs.* IRAM HENSHAW, CHRISTIAN KNOHLTER, W'M R. REECE, J. M. REECE, Frederick Whyble, Edward Hale, W'm Bryman, Daniel Kraus, Barkley Thomas, Mahlon Stubbs, J. Weaver, and Otis Richards, def'ts.	Civil action.

The motion in this case to set asid' the report of the Hon. Nelson Cobb, referee, coming on to be heard, and the arguments of counsel having been heard as well for the plaintiffs as defendants, the
132 court, on consideration thereof, do overrule said motion, and order that the said report and all the matters and things therein contained be ratified and confirmed; to which ruling of the court the said plaintiffs, by their said counsel, except, and pray that their exceptions may be entered on the journals of this court; which is accordingly done.

STATE OF KANSAS,
County of Douglas, ss:

I, B. D. Palmer, clerk of the district court sitting in and for the said county and State, do hereby certify that the above and foregoing is a true, complete, and correct transcript of the records of all the proceedings and orders of the court and judgment in the above-entitled cause, as the same now remain on file and appear of record in my office.

Witness my hand and the seal of said court affixed, at my office in the city of Lawrence, this 9th day of Jan'y, 1869.

[L. S.] (Signed) B. D. PALMER,
Clk Dis. Court.

133 THE STATE OF KANSAS,
Supreme Court, ss:

I, Abraham Hammatt, clerk of the supreme court of the State of Kansas, do certify that the foregoing is a true copy of the "transcript of the record from the district court of Douglas County, Kansas," in the cause as above entitled, as appears of file and record in this office.

Witness my hand and official seal hereto affixed this 25th day of October, A. D. 1870.

[SEAL.]

A. HAMMATT,
Clerk Supreme Court State of Kansas.

134 And thereafter, to wit, on the same day, Oct. 13th, 1869, the following summons was issued:

135 SUPREME COURT, *the State of Kansas, ss:*

To the sheriff of Douglas County, greeting:

You are hereby commanded to notify Iram Henshaw, Christian Knohlet, J. M. Reece, W'm R. Reece, Fred'k Whyble, Edward Hale, W'm Bryman, David Kraul, Otis Richards, & M. Stubbs, that John McAlpin, Mary Walker, & Isaiah Walker did, on the 13th day of October, A. D. 1869, file in the clerk's office of the supreme court of Kansas his petition in error and transcript of record, the object of which is to obtain the reversal of a certain judgment rendered against them by the district court for the 4th judicial district, State of Kansas, sitting within and for the county of Douglas, at the November term thereof, A. D. 1869, in an action pending before said court, wherein the said John McAlpin, Mary Walker, & Isaiah Walker were plaintiffs, and the said Iram Henshaw et al's were defendants.

You will make due return of this summons in error on or before the 23 day of October, A. D. 1869.

Witness my hand and the seal of said court, affixed at my office, in the city of Topeka, this 13th day of October, A. D. 1869.

[L. S.] E. B. FOWLER, *Clerk.*

136 (Indorsed:) Supreme court, the State of Kansas. John McAlpin et al. versus Iram Henshaw et al. Summons in error. Issued Oct. 13th, 1869. Returnable Oct. 13, 1869. Filed Oct. 18th, 1869. E. B. Fowler, clerk. Wilson Shannon, att'y for pl'ff.

Rec'd the within summons this 16th day of October, A. D. 1869, at 10 o'clock a. m., and served the same day by delivering to L. O. Thacher, the att'y of record in the original suit for the defendants, a true copy thereof.

SAMUEL WALKER,
Sheriff Douglas Co., Kan's,
Per ANDREW CARNES,
Under Sheriff.

Fees: Service, 50; mileage, 20—$ 70.

137 THE STATE OF KANSAS,
Supreme Court, ss:

Be it remembered that, thereafter, to wit, on the 4th day of March, A. D. 1870, the following proceedings were had, it being at the January (1870) term of said court.

JOHN MCALPIN ET AL.
vs.
IRAM HENSHAW ET AL.

This cause came on to be heard, and was submitted on briefs of Wilson Shannon, esq., att'y for plaintiffs in error, and on briefs of Thacher & Banks, esq's, att'ys for defendants in error, and taken under advisement by the court.

138 Afterwards, to wit, on 12th day of April, A. D. 1870, at the January term of said court, the following proceedings, among others, were had:

JOHN MCALPIN ET AL.
vs.
IRAM HENSHAW ET AL.

This cause came on to be heard upon a transcript from the record of the district court sitting in and for Douglas County, and was submitted on briefs of parties, by their attorneys, and considered by the court: whereupon Kingman, C. J., announced the decision of the court, and it was ordered and adjudged that the judgment of the district court of Douglas County be affirmed.

Safford, J., concurring.

Valentine, J., did not sit in this case.

And it was further considered and adjudged that the plaintiffs in error, John McAlpin et al., pay the costs of this court, and that
139 execution issue therefor; to which judgment of the court the plaintiff in error excepts.

And afterwards, to wit, on the 15th day of April, A. D. 1870, the following proceedings, among others, were had, to wit:

140 SUPREME COURT,
The State of Kansas, ss:

To the district court within and for fourth judicial district, Douglas County, Kansas, greeting:

Whereas in a certain civil action lately pending before you, wherein John McAlpin et als. were plaintiffs and Iram Henshaw et als. were defendants, a judgment was rendered by you in favor of the said Iram Henshaw et als.; on a transcript of which judgment and record said John McAlpin et als. prosecuted a petition in error in the supreme court within and for the State of Kansas:

And whereas at the January term of said supreme court, A. D. 1870, on consideration of the said petition in error, it was ordered and adjudged by the said supreme court that the said judgment of the district court of Douglas County be affirmed:

You are, therefore, commanded that, without delay, you cause execution to be had of the said judgment of the supreme court, according to law, the said petition in error to the contrary notwithstanding.

Witness my hand, and the seal of said supreme court affixed, at my office, in the city of Topeka, on the 15th day of April, A. D. 18 .

[L. S.] E. B. FOWLER, *Clerk.*

141 STATE OF KANSAS, *Supreme Court:*

JOHN MCALPIN ET AL., PL'FF' IN ERROR,
vs.
IRAM HENSHAW ET AL., DEF'T' IN ERROR.

I do hereby certify that the above-named plaintiff in error filed in this office, on the 24th day of October, A. D. 1870, a copy of the writ of error, indorsed, "Copy of the writ of error lodged, in pursuance to the statute of the United States in such case made and provided, for the within-named defendants in error," signed "Wilson Shannon, att'y for plaintiffs in error." And I do further certify that the said plaintiffs, on the same day, filed in this office a bond of the sum of one thousand dollars, approved by Samuel A. Kingman, chief justice of the supreme court of the State of Kansas, which said papers are on file in this office.

Witness my hand & official seal, hereto affixed, this 25th day of October, A. D. 1870.

[SEAL.]

A. HAMMATT,
Clerk Supreme Court, State of Kansas.

142 THE STATE OF KANSAS,
Supreme Court:

I, Abram Hammatt, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a true, complete, and correct transcript of the record of all the pleadings, proceedings, and orders and judgment of the said court in the case as above entitled, as the same now remain on file and appear of record in my office.

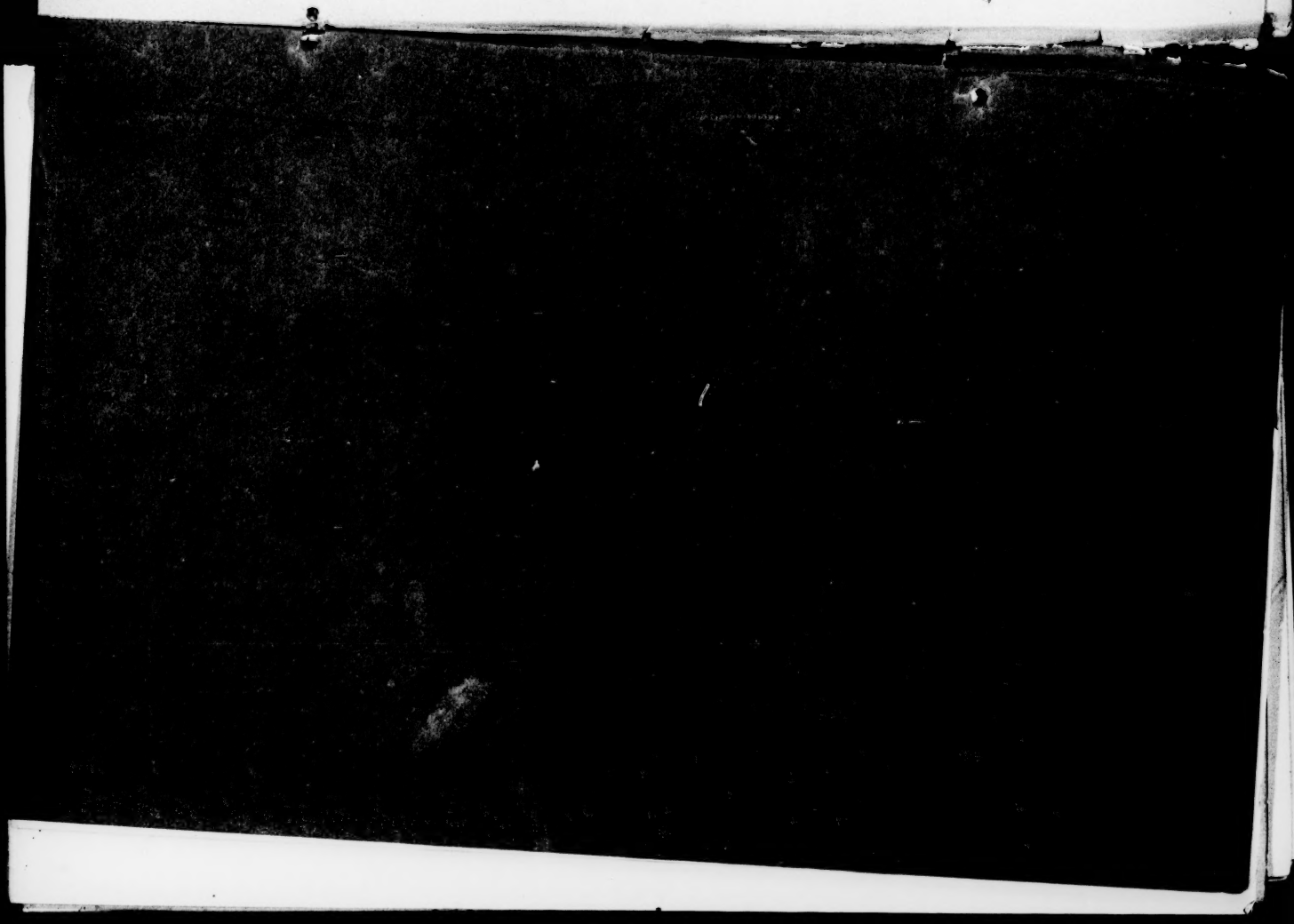
Witness my hand and the seal of said court, hereto affixed, at Topeka, Kansas, this 25 day of October, A. D. 1870

[SEAL.]

A. HAMMATT,
Clerk Supreme Court, State of Kansas.

Fees of clerk sup. court, $38 15.

(Indorsement on cover:) No. 528. Mary Walker, J. Walker, and J. McAlpine, plaintiffs in error, vs. Iram Henshaw, C. Knohler, W. R. Reece, J. N. Reece, & Frederick Whyble, et al. Kansas sup. court. Filed 17 March, 1871.



SUPREME COURT

OF THE

UNITED STATES.

JOHN McALPIN, MARY WALKER, AND ISIAH WALKER, *Plaintiffs.*

vs.

IRAM HENSHAW, CHRISTIAN KNOHLER, WM. R. REECE, J. M. REECE, FREDERICK WHYBLE, EDWARD HALE, WILLIAM BRYMAN, DANIEL KRAUS, BARKLEY THOMAS, MAHLIN STUBBS, J. WEAVER, OTIS RICHARDS, *Defendants.*

ARGUMENT FOR PLAINTIFFS.

By JOHN P. USHER.

LAWRENCE, KANSAS:
TRIBUNE JOB PRINTING ROOMS.
1872.

IN THE SUPREME COURT

OF THE

UNITED STATES.

JOHN McALPIN, MARY WALKER, and ISIAH WALKER, Plaintiffs,
vs.
IRAM HENSHAW, CHRISTIAN KNOHLER, WM. R. REECE, J. M. REECE, FREDERICK WHYBLE, EDWARD HALE, WILLIAM BRYMAN, DANIEL KRAUS, BARKLEY THOMAS, MAHLIN STUBBS, J. WEAVER, OTIS RICHARDS, Defendants.

REPORT OF NELSON COBB, REFEREE.

To the District Court of the Fourth Judicial District, Douglas County:

I, the undersigned referee, appointed by said court to try the above entitled action, respectfully report: That on the 10th day of September, 1866, the parties above named appeared before me, at the office of Cobb & Chadwick, in Lawrence, Douglas county, the time and place fixed by me for said trial, the said plaintiffs appearing by Wilson Shannon, Esq., and the defendants by E. V. Banks, Esq., their respective counsel, and said referee having been first duly sworn, proceeded to trial. And I, the said referee, having heard the proofs and allegations of the several parties, and arguments of their said counsel, and duly considered

the same, do find as the facts in said action: That by the fourteenth article of the treaty between the United States and the Wyandotte nation of Indians, made at Upper Sandusky, in the State of Ohio, ratified on the fifth day of October, 1842, the United States agreed to grant to Irwin P. Long a section of land of six hundred and forty (640) acres, out of any lands west of the Missouri river, set apart for Indian use, not already claimed or occupied by any person or tribe. That by the ninth article of that treaty with the same tribe, made and concluded on the thirty-first day of January, 1855, it was agreed by the United States that each of the individuals to whom reservations were issued, by the articles first aforesaid, or their heirs or legal representatives, should be permitted to select and locate said reservations on any government land west of the States of Michigan and Iowa, subject to pre-emption act settlement; said reservations to be patented by the United States in the names of the reservees, and that said reservees, except certain incompetent persons, should have the unrestricted right to sell and convey such land. That on the eighth day of May, A. D. 1857, Samuel Stover, a white man, as agent for said Long, filed, in the office of the Surveyor General of Kansas and Nebraska, a written notice to the effect that he, as such agent, had that day selected and located the reserve of land of Long, under said treaties, upon the land described in the plaintiffs' petition. That on the 17th day of September, 1857, notice was sent, by the Surveyor General, of such location, to the department of the Interior. That on the thirtieth day of May, A. D. 1861, a patent was executed by the United States, purporting to convey said land to said Long, pursuant to said treaties, which was afterward duly delivered. That

on the sixth day of September, A. D. 1861, the said Irwin P. Long, by deed, duly executed, conveyed an undivided two-thirds of said land to the plaintiff, Mary Walker. That on the same day, said Long, by deed conveyed an undivided third of said land to the plaintiff, John McAlpin. That in the month of February, A. D. 1857, James Whaley, then being personally qualified to pre-empt land of the United States, entered upon and made settlement in person and commenced to improve, with intent to pre-empt and purchase from the United States, the south-east quarter of section seventeen (17), township thirteen (13), of range twenty-one (21), in Douglas county, parcel of the land described in said petition, and continued to reside thereon and improve the same with such intentions up to the time he purchased the same, as hereinafter stated. That said Whaley making such settlement, within thirty days thereafter, went to the proper local land office, with intent to file notice of his said settlement and intention to pre-empt, and offered to make such filing, but the register of said office refused to allow filing, on the ground that said land was not pre emptable. That in April of the same year, said Whaley went to the same office and made the same offer, which was refused by the register, on the same ground. That on the thirtieth day of July, 1858, said Whaley duly filed in the office of the register of said land office, a notice of his settlement on said land, and of his intention to pre-empt the same, dating the time of his settlement July 22d, 1858, ~~at the suggestion of the said register.~~ That on the fifth day of May, 1859, said Whaley purchased said land and paid for the same with a military land warrant, No. 44,879, and took the usual certificate of such purchase and payment. That on the tenth day of August, 1860, said

pre-emption and purchase was approved by the Commissioner of the General Land Office of the United States, and the register of said local land office was duly notified by letter from said Commissioner of such approval. That afterwards the said Whaley applied to the register of said local land office, at his said office, for a patent from the United States to him, for said land, and was informed by said register that said patent had been sent from Washington to said office and afterwards recalled. That on the eighth day of June, 1864, the said James Whaley and his wife conveyed said land to the defendant, Frederick Whyble, by deed in fee simple. And I further find that the defendant, Iram Henshaw, holds the west half of the northeast quarter of section twenty (20), of township thirteen (13), of range twenty-one (21) in said petition described, by and under a right divided from pre-emption and purchase, in all respects similar to the pre-emption and purchase aforesaid of said Whaley, to the said southeast quarter of said section seventeen, and his (Henshaw's) right under said purchase to the said west half of the northeast quarter of said section twenty-one, in all respects the same as the right of said Whaley to said southeast quarter of said section seventeen above set forth, and none other. That defendant, Edward Hale, holds the south half of the northwest quarter of section twenty-one, in said petition described, by rights similar in all respects to the aforesaid title of said Whyble. That the defendant, Christian Knohler, holds the same right to the northeast quarter of the northwest quarter of said section twenty-one. That the defendant, Daniel Kraus, holds the same right to the northwest quarter of the northeast quarter of said section seventeen. That the defendant, Mahlin Stubs, holds the northwest quar-

ter of the northwest quarter of said section twenty-one, by the same right. That the defendant, Weaver, holds the southwest quarter of the northeast quarter of said section seventeen, by the same right. That said defendant, Barkley Thomas, holds the same right to the east half of the northeast quarter of said section twenty. That the said defendant, Otis Richards, holds the same right to the northeast quarter of the northeast quarter of said section seventeen. That said defendant, William Bryman, holds the southeast quarter of the northeast quarter of said section seventeen, by the same right. That each of the said defendants keep the plaintiffs out of possession of the portion of said lands, so held by him as aforesaid, and none other. That the said defendant, William R. Reece, is, and at the commencement of this action was, in the occupancy of the east half of the northeast quarter of said section twenty, as the tenant of said defendant Thomas, and not otherwise, and kept and keeps the plaintiffs out of the possession thereof, and none other. That J. M. Reece, defendant, at the commencement of this action was, and still is, in the occupancy of the southeast quarter of said section seventeen, as tenant of the defendant Whyble, and not otherwise, and keeps the plaintiffs out of possession thereof, and of none other. That the lands in question are parcel of the lands ceded to the United States by the Shawnee tribe of Indians, by treaty, finally ratified with amendments on November 2d, 1854, and lying between the Missouri State line and a line parallel thereto, and west of the same thirty miles distant. That said land, described in said petition, was first opened for settlement, pre-emption and sale, by the United States Government, by order of the President thereof, on the ninth day of July, A. D. 1858, of which the said officers of the said local land

office had due notice. And I find, as matter of law, that up to the said ninth day of July, A. D. 1858, neither the plaintiffs, nor the defendants, nor said Long, had acquired any right, legal or equitable, in or to said land. That up to the time of said purchase and payments neither the plaintiffs of said Long had acquired any right, legal or equitable, thereto; that by said purchase and payment, so made as aforesaid on the fifth day of May, 1859, a perfect, equitable title to the said southeast quarter of said section seventeen vested in said James Whaley, and like titles at the same time vested to the several other purchasers of said land to the parcels so purchased by them respectively. That the said patent to said Long conveyed the legal title to said lands, subject to the equitable rights of those holding the equitable titles under said preemption and purchase, and the plaintiffs hold said legal title, to the southeast quarter of said section seventeen, in trust for the defendant, Frederick Whyble. That the plaintiffs hold said title to the west half of the northeast quarter of said section twenty, in trust for said defendant, Iram Henshaw, and the east half of the same quarter-section, in trust for defendant, Barkley Thomas. That said plaintiffs hold the said title to the south half of the northwest quarter of said section twenty-one, in trust for said Edward Hale. The northeast quarter of the northwest quarter of said section twenty-one, in trust for said Christian Knohler. And the northwest quarter of the same quarter-section, in trust for said defendant, Mahlin Stubbs. And the northwest qnarter of the northeast quarter of said section seventeen, in trust for said defendant, Daniel Kraus. The southeast quarter of the northeast quarter of the same quarter section, in trust for said William Bryman. And the northeast quarter

of the same quarter-section, in trust for defendant, Otis Richards. And the southwest quarter of the same quarter-section, in trust for said J. Weaver, defendant above named. And I do further find that the defendants are entitled to judgment that the plaintiffs convey by deed to each of the defendants, respectively, who own such equitable titles, within thirty days after judgment, or in default thereof, that the judgment stand for and have the force and effect of such conveyance, and that the defendant recover their costs.

All of which is respectfully submitted, this fourteenth day of December, A. D. 1866.

N. COBB,
Referee.

ARGUMENT FOR PLAINTIFFS.

This case was referred to Nelson Cobb, in the court below, who reported the facts found by him, and the legal conclusions arising therefrom. No exceptions were taken to the finding of the facts, but only the conclusions of law arising on those facts. It will not be necessary, therefore, for the court to look beyond the facts found by the referee, the only question being whether his inferences of law are correct.

In this case, the plaintiffs claim title to the land in question, under a Wyandotte float (No. 9), secured to Irwin P. Long, a Wyandotte Indian, by the fourteenth article of the treaty between the United States and the Wyandotte nation of Indians, of the 17th day of March, 1842, and ratified 5th of October, 1842. (*See the United States Statutes at Large, vol. 7, pp.* 608–9.) It is admitted that if the title of Irwin P. Long is good, that the plaintiffs must recover.

By the treaty above mentioned, among other things, it is provided (*article* 14) that the United States agree to grant by patent in fee simple to each of the following named persons and their heirs, all of whom are Wyandottes by blood or adoption, one section of land (640 acres) each, out of any lands west of the Mississippi river set apart for Indian use, not already claimed or occupied by any person or tribe, to wit: Irwin P. Long, and a number of other Wyandottes named in said article. Article 14 is amended by the Senate by striking out the word "Mississippi," and inserting "Missouri," so that the article reads, "out of any lands west of the Missouri river set apart for Indian use, not already claimed or occupied by any person or tribe."

At the time the treaty of 1842 was entered into, what is now the State of Kansas was known as the Indian country, and set apart for Indian use. The Senate, in amending the treaty by striking out the word "Mississippi," and inserting the word "Missouri," clearly indicated their intention that these Wyandotte floats should be located in what is now the State of Kansas, which, at the date of the treaty, had been set apart for Indian use.

By the treaty between the Wyandotte Indians and the United States of January 31st, 1855 (*see the United States Statutes at Large, vol.* 10, *page* 1,162, *sec.* 9), it is provided, among other things, that each of the reservees under said treaty of 1842 shall be permitted to select and locate on any Government land west of the States of Missouri and Iowa, subject to pre-emption and settlement, said reservations to be patented by the United States in the name of the reservee, as soon as practicable after the selections are made. Said article gives to the reservees the unrestricted right to sell and convey, etc. Said article further provides that the selections of said reservations, upon being reported to the Surveyor General of the district in which they are made, shall be entered on the township plats, and reported without delay to the Commissioner of the General Land Office, and patents issued to the reservees accordingly; and any selection of, or settlement upon, or claim to, land embraced in any of said reservations, made by any other person or persons, after the same shall have been selected by the reservees, their heirs, or legal representatives, shall be null and void.

By the treaty with the Shawnee Indians of the 10th of May, 1854, ratified 2d of November, 1854 (*see the United States Statutes, vol.* 10, *page* 1,053), among other things, it is provided that the Shawnees are to

have two hundred thousand acres of land for certain purposes specified in the treaty, and to be selected as in said treaty provided; that the assignments and selections provided for in said treaty shall be made from the lands situated between the Missouri State line and a parallel line thirty miles west of it, within ninety days after the approval of the survey of said tract, after the selection of the two hundred thousand acres by the Shawnees between said parallel lines, the surplus remaining within those lines shall be set apart by the President, and declared open to pre-emption and settlement.

The surplus situated between the two parallel lines above referred to was declared by the President open to pre emption and settlement, on the 9th day of July, 1858, as found by the referee.

By article 5 of the Shawnee treaty of 1854 (*vol.* 10, *page* 1,055), it is provided that the land lying between the Missouri State line and the parallel line thirty miles west of it, as soon after the ratification of the treaty as can conveniently be done, shall be surveyed, etc., and no white person or citizen shall be permitted to make location or settlement within said limits until after all said lands shall have been surveyed and the Shawnees shall have made their selections and locations, and the President shall have set apart the surplus. This the President did, as above stated, on the 9th of July, 1858, as found by the referee.

The reservation of Irwin P. Long of 640 acres was paid for in 1842, at the date of the treaty, and was a debt owing by the Government until it was satisfied by the location of the land and approval by the Government. The location of this float on the 8th day of May, 1857, and the subsequent ratification and approval of said location on the part of the Government,

is the same, in a legal point, as if Long had on that day entered and paid for this 640 acres; and it is a well settled rule of law, that the entry of a tract of land withdraws the same from market or pre-emption claim, and no right to the same arising subsequently to the entry and before cancellation can be recognized. (*Lester's Land Laws, pages* 407-8. *No.* 461.) No distinction can be drawn between the location of a Wyandotte float and an entry at the land office of a tract of land and the payment therefor. In both cases the location and the entry may, for good cause, be disapproved of by the Government; but if approved of and patented, the patent relates back to the time of location in the one case, and to the date of the entry in the other.

Irwin P. Long's float was located on land set apart for Indian use, west of the Missouri river, and not already claimed or occupied by any person or Indian tribe.

This location was made on the 8th of May, 1857, and duly reported to the Surveyor General, and by him to the proper department at Washington, and in due time was patented. This was a legal location of Irwin P. Long's float, under the treaty of 1842, because the land on which it was located was west of the Missouri river, and had been set apart for Indian use, and was not claimed or occupied by any person or tribe. It cannot be claimed that the defendants in this case, by going on this land in February, 1857, and before the 9th of July, 1858, when this land first became open to pre-emption and settlement, could prevent Long from locating his float on the land in question.

The 5th article of the Shawnee treaty of the 10th of May, 1854, above referred to, is conclusive on this question. It provides that no white persons or citizens

shall be permitted to make locations or settlements within said limits until all said lands shall have been surveyed, and the Shawnees shall have made their selections and locations, and the President shall have set apart the surplus. The defendants, by settling on this land before the surplus had been set apart by the President and the other conditions had been complied with, were trespassers. They were intruders into the country set apart for Indian use. They were wrong-doers, and in possession of this land in direct violation of the 5th article of the Shawnee treaty above referred to, and were liable to be prosecuted by the Government for violating the provisions of the non-intercourse act of June 30th, 1834. (*See Brightly's Digest of the Laws of the United States, page* 428, *sections* 60 and 61.) The defendants were subject to heavy penalties for going on this land in violations of treaty stipulations and the laws of the United States.

It cannot be pretended that land claimed or occupied in violation of treaty stipulations and of law, as this land was by the defendants when Irwin P. Long made his location, excluded him from making his location thereon, under the 14th article of the Wyandotte treaty of 1842. A wrong-doer or trespasser can claim no right or advantage from his wrongful act. This is a principle of law too familiar to require any reference to authorities. Nor can these defendants, by their own wrong and illegal act, deprive Irwin P. Long of any right in the location of his float. So far as the defendants and Irwin P. Long are concerned, then, this land is to be considered as not claimed or occupied by any person at the time of the location of this float, on the 8th of May, 1857.

Was it claimed or occupied by any Indian tribe? By the treaty of the 10t of May, 1854, above referred

to, the Shawnees cede to the United States all their land in Kansas, but they have a right to select two hundred thousand acres for certain purposes specified in the treaty. The tract of country lying between the Missouri State line and the line parallel thereto thirty miles west of it, is set apart by the treaty for Indian use, and all white settlers are prohibited from going on the same until it is proclaimed open to pre-emption settlement. It is true that the Shawnees had a right to select the land in question, as part of their two hundred thousand acres, under the Shawnee treaty of 1854, and if they had so selected it, their right would have been better than the right of Long or any one else. But they did not so select it, and until so selected it was not claimed by the Shawnees or any "Indian tribe," and, being in the country set apart for Indian use, was subject to the location of this Wyandotte float, under the treaty of 1842.

Irwin P. Long was a Wyandotte Indian, and so recognized by the Wyandotte treaty of 1842. The prohibition as to settlement and location in the 5th article of the Shawnee treaty above referred to does not apply to Indians, but only to "white persons" or "citizens." He was not precluded, therefore, from making a settlement or location on the land in question, by the 5th article of the Shawnee treaty above referred to. The defendants were subject to the prohibitions, as they were white persons and citizens, claiming the rights of pre-emption. It was not necessary, however, for Long to make a settlement; all he had to do was to make a location of his 640 acres, and report the same to the Government for approval. This he did. It was not necessary he should go on the land or within this country set apart for Indian use, in order to make his location. The location is made from the maps in the office of the Surveyor General.

Heretofore, I have claimed that Irwin P. Long had a legal right, on the 8th of May, 1857, to locate his float on the land in question, under and by virtue of the provisions of the treaty of 1842; that this land being situated between the west Missouri State line and the parallel line thirty miles west of it, was land set apart for Indian use, and not already claimed or occupied by any person or tribe, and was, therefore, open to be located by any of the Wyandotte floats, under the treaty of 1842, subject alone to the selections to be made by the Shawnees, under the treaty of 10th of May, 1854. I think there can be no doubt of the correctness of this position. If I am correct in this view of the case, Irwin P. Long's right to the land in question became vested and perfect in equity on the 8th of May, 1857, when he filed his location in the office of the Surveyor General. This act having been followed by a notice, sent on the 17th of September, 1857, to the proper department by the Surveyor General, and the location having been approved of at Washington by the Government, and followed by a patent to Irwin P. Long for this land, dated 30th of May, 1861, his legal and equitable title became perfect.

By the Wyandotte treaty of 31st of January, 1855, the 9th article, above referred to, the rights of the Wyandottes holding floats under the 14th article of the treaty of 1842 are enlarged. Before the treaty of 1855, these floats could only be located on lands west of the State of Missouri set apart for Indian use; under the treaty of 1855, these reservations were authorized to be located on any Government land west of the States of Missouri and Iowa, subject to pre-emption and settlement. The desire of the Government to satisfy and discharge these old claims is manifest from the provisions requiring them to be patented as soon

as practicable after the selections are made, and by requiring the Surveyor General to enter such selections on his plats, and report without delay to the Commissioner of the General Land Office, and requiring the patents to be issued accordingly; and by declaring selection of, settlement upon, or claim to, made by any other person, after the same shall have been selected by the reservees, shall be null and void. It is impossible to read this 9th article without being satisfied that the Government was strongly impressed with the justice of the claims, and desirous that they should be satisfied without further delay. Hence, the reservees are not restricted in the location of their floats to land set apart for Indian use; but their rights are enlarged by the treaty of 1855, so that these floats can be located on any Government lands subject to pre-emption, west of Missouri and Iowa. There is no conflict in these treaties. Each opens up a different class of lands on which these reservations can be located; before the treaty of 1855, they could only be located on land set apart for Indian use.

But for the sake of the argument, we will leave out of view the class of land on which these reservations could be located under the treaty of 1842, and inquire into the respective rights of these parties under the Wyandotte treaty of 1855, which permits these floats to be located on any Government land subject to pre-emption west of Missouri and Iowa. The land in question was first open to pre-emption and settlement on the 9th of July, 1858. At this time, Irwin P. Long had located his 640 acres on the land in dispute, and reported his location to the Surveyor General, who had reported the location to the proper department at Washington. Irwin P. Long had done everything that he could do, or that the law required him to do,

in order to perfect his right to this land, and there remained on that day, (9th of July, 1358), nothing to be done by Long, or any officers of the Government, to perfet his title, except the issuance of the patent. He had paid for this land as long ago as 1842, as is proved by that treaty. He had made his location, reported the same to the Surveyor General, who had reported the location to the Government, and the Government in due time approved the location, and on the 30th of May, 1861, issued him a patent in fee, according to the provisions of the treaty.

Now, what were the rights of the defendants on the 9th of July, 1858? I have already shown that before the land in question was open to settlement, they had no rights, and could have none; that they were wrong-doers, and in possession in violation of treaty stipulation and of law. When the land was open to pre-emption and settlement they had to make their settlement, occupy and erect a dwelling house thereon, and file their declaratory statement, as required by the pre-emption laws. They had not paid or offered to pay for the land; whereas, Long had paid for the 640 acres as early as 1842. His equity, therefore, was an old and superior equity to any equity the defendants could claim. If the case stood on the mere equities of the respective parties, Long's title would be superior to that of the defendants. It is a rule in equity that between equal equities, that which is earliest in time is preferred. (*Robinson vs. Cathcart*, 2 *Cranch C. Ct.* 590.) But in this case, the equity of Long was superior to the equity of the defendants on the 9th of July, 1858, as he had at that time actually paid for this land, and the defendants had done nothing but make a naked settlement, and this settlement, according to their own declaratory statement, was not made until

July 22d, 1858, as found by the referee. The record then shows that the location of Long had a legal existence under the pre-emption laws, or after the land was open to pre-emption, eleven days before the defendants made their settlement. The defendants are concluded by the record, and the referee has found that the defendants have dated their settlement on the 22nd of July, 1858. But, suppose they had dated their settlement on the 9th of July, 1858, when the land was first open to pre emption settlement, still their equity would be junior to the equity of Irwin P. Long, for the reason that they had paid nothing on the land, and Long had paid for it in full as far back as 1842, and in addition to this, had done everything that the law had required him to do, to perfect his title. We claim, then, that if we look no farther than the pre-emption laws, and leave out of view Long's right to locate his float, under the treaty of 1842, on any land set apart for Indian use, that the right of Long is superior to the rights of the defendants.

But, to state the case in the most favorable point of view for the defendants, we will suppose, for the argument, that neither Long nor the defendants had any rights to the land in question previous to the ninth of July, 1858, when it was open for the first time to pre-emption settlement—this is the view taken by the referee, which I think is plainly and palpably wrong—but concede this, for the argument, to be correct, and then how stands the rights of these parties? When the land was declared open to settlement, the settlement and occupancy of the defendants, from thenceforward, was legal. It is equally true that the location of Long's float from that date became legal also. The most that could be claimed for the defendants is that they have equal equities with Long, although I think

I have shown that Long's equity is the oldest, and is superior to the equity of defendants.

Now, it is a well settled principle of law that when the equities of parties are equal, the party having the legal title will prevail. In support of this, see *Willard's Equity*, pp. 45–255; *Bruce vs. Duchess of Marlborough*, 2 *P. Williams*, 491; *Robinson vs. Cathcart*, 2 *Cranch, C. Ct.*, 590; *Fitzsimmons vs. Ogden*, 7 *Cranch*, 2; 2 *Curtis*, 432; *Phillips, vs. Crammond*, 2 *Washington C. Ct.*, 441.

The patent in this case issued to Long on the thirtieth of May, 1861, which made his title perfect, both in law and equity; then Long, having, to say the least, an equal equity with the defendants, and the legal title, must prevail.

The report of the referee finds that Whaley, and other defendants, filed on their respective tracts on the thirtieth of July, 1858, and dated their settlements July 22d, 1858. That on the 5th day of May, 1859, Whaley and others pre-empted their land and paid for the same, at the local land office, and took the usual certificate. That on the 10th of August, 1860, the pre emption and purchase was approved by the Commissioner of the General Land Office. That afterwards, Whaley and others applied to the register at the local land office, for patents, and were informed by the register that patents had been sent from Washington to said office, and afterwards recalled. This is nothing more than an ordinary case, when an entry has been allowed by mistake, and the mistake being discovered, the entry is cancelled, and the patents, before being delivered, are ordered, by the Commissioner of the General Land Office, to be returned. This is almost of daily occurrence, and has, time out of mind, been the practice of the Government. In

this case the mistake was no doubt caused by the office at Washington failing to report Irwin P. Long's location of his float; but this is no fault of Long's, and he in no way is to be prejudiced by it. The remedy of these defendants is plain, and pointed out by act of Congress, and the practice of the General Land Office. They can apply to have their money or land warrants returned, and all they have paid will be refunded.

The settlement made by the defendants in February, 1857, was clearly illegal, as I have heretofore stated, and conferred no rights. Its illegality was known to them, for they were on two occasions (in February and April, 1857), advised by the register of the local land office, that this land was not subject to pre-emption and settlement.

Whatever improvements they put on the land, therefore, were put there with full notice that they were trespassers on the land, which had been set apart for Indian use.

But these are matters which the court can take no notice of, as it matters not whether the defendants knew they were on this land in violation of law and the rights of the Indians, or not. Like everybody else, they are bound to know the law.

In conclusion, then, we claim: 1. That the land lying between the west boundary of the State of Missouri and the parallel line thirty miles west of it, was, at the time of the location of Long's float, land set apart for Indian use, and was not occupied, or claimed, by any person or tribe, and that therefore the location of Long's float was legal, under the Wyandotte treaty of 1842, and a patent having issued to Long for the land, it relates back to the time of the location of the float. In the case of French vs. Spencer (21 *Howard's*

Reports, 240), the Supreme Court of the United States decide that an entry in the land office, on which a patent issue (no matter how long after the entry is made), relates back to the entry, and takes date with it. This principle applies to the location of Long's float, and makes his title good from the eighth of May, 1857, when it was first located.

2. We claim, under the pre-emption laws, that Long had the oldest equity, and for that reason it was superior to the equity of the defendants.

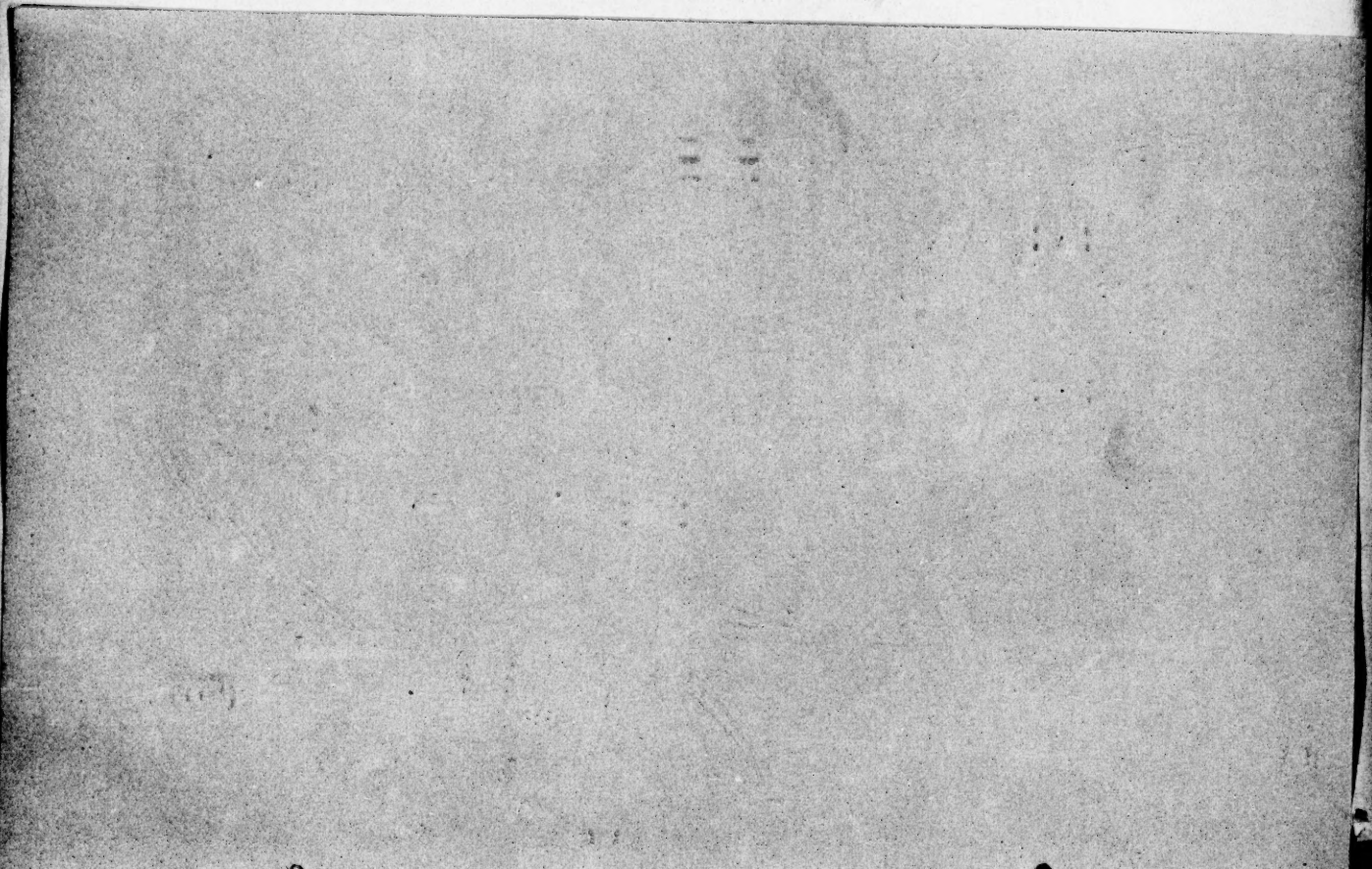
3. That if the equity of Long and the defendants were only equal, Long, having the legal title, joined with his equal equity, must prevail.

On every one of these points the right is with Long, or those claiming under him, and the judgment of the court below should be reversed, and this court should enter such a judgment as the court below should have entered, on the facts found by the referee.

All of which is most respectfully submitted.

JOHN P. USHER.

Att'y for Plaintiffs in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1872.

MARY WALKER, *et al.*,
vs. } 83.
TAYLOR, *et al.*

IN ERROR IN THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF THE PLAINTIFFS IN ERROR.

The plaintiffs in error brought an action in the Fourth District Court Douglass county, Kansas, to recover certain lands. alleging that they had a legal estate therein, and were entitled to the possession thereof, and that the defendants unlawfully kept them out of the possession of the same. The defendants severed in their defense. Each pleaded a general denial, and, also, a further plea, setting up, as to so much of said lands whereof he was in the sole possession, an equitable title under the pre-emption laws of the United States, and praying for a judgment and decree that the plaintiffs execute a proper and sufficient conveyance to him, and that in default thereof the judgment operate as such conveyance. The plaintiff replied denying the affirmative matters set up by the defendants. The case was tried by the court and a judgment rendered in favor of the plaintiffs, which, on motion of the defendants, was vacated and set aside. (Record,

page 28.) It was then agreed that so far as the title to the land in question was concerned, the whole case, as to all of the defendants who appeared, should be tried and submitted on the evidence adduced relative to the portions of the land described in the separate answer of Frederick Whyble, and that the decision of the question as to the other parcels of land, included in said petition, should depend upon Whyble's title. The case was submitted to a referee, who submitted his report. (Record, page 134.)

The facts are set forth in the report of the referee, and obviate the necessity of making a connected statement of them in this brief. Judgment was rendered in favor of the defendants, and that the plaintiffs, pursuant to the report of the referee, convey by deed to each defendant the specific parcel of land whereof he was in possession, and that in default of executing and delivering such conveyance within thirty days from the rendition of the judgment, the judgment should stand for and have the force and effect of such conveyance. Proper exceptions were taken by the plaintiffs to the report of the referee and to the action of the court thereon. (Record, pages 38 and 39.)

On an appeal to the Supreme Court of the State of Kansas, the judgment of the District Court was in all things affirmed.

The plaintiffs claim title under Irwin P. Long, a Wyandotte Indian. The whole controversy turns upon the validity of his title.

By the fourteenth article of the treaty with the Wyandottes of March 17, 1842, (Stats.-at-Large, vol. xi, p. 581,) the United States agreed to grant to each of the Wyandottes therein named, of whom Irvin P. Long was one, one section of land, of six hundred and forty acres, out

of any lands west of the Missouri river set apart for Indian use, not already claimed or occupied by any person or tribe. The article further provides that the lands thereby granted are to be selected by the grantees.

By the ninth article of the treaty made and concluded on the 31st day of January, 1855, (Stats., vol. x, p. 1159, *et seq.*,) the United States stipulates that each of the individuals to whom reservations were granted by the fourteenth article of the preceding treaty, or their heirs or legal representatives, shall be permitted to select and locate said reservation on any Government lands west of the States of Michigan and Iowa subject to pre-emption and settlement, and grants to them, their legal heirs or proper representatives, the unrestricted right to sell and convey the same whenever they may think proper. It further provides that the selection of said reservations, upon being reported to the Surveyor General of the district in which they are made, shall be entered upon the township plats, and reported, without delay, to the Commissioner of the General Land Office, and patents issued to the reservees accordingly.

On the 8th of May, 1857, Long filed in the office of the Surveyor General of Kansas and Nebraska a written notice that he had that day selected his reservation upon the lands in controversy. On the 17th of September, 1857, notice was sent by the Surveyor General of said selection to the Department of the Interior. A patent for said lands was issued on the 30th day of May 1861, to said Long, who on the 6th day of September conveyed the undivided two-thirds of said land to Mary Walker, and the undivided one-third thereof to John McAlpine, plaintiffs in this suit.

The last treaty was obviously intended not to limit or qualify, but to extend and enlarge the right conferred by

the preceding treaty, upon the Wyandotte grantees. Long had the undoubted right to select six hundred and forty acres either from land set apart for Indian use west of the Missouri river, not already claimed or occupied by any person or tribe, or from Government lands west of the States of Michigan and Iowa subject to pre-emption and settlement.

The phraseology of our Indian treaties is not noted for its exact precision. The words "set apart for Indian use, and not already claimed or occupied by any person or tribe" are, perhaps, somewhat ambiguous; but it is submitted that the tract selected did, as much at least as any other, conform in every essential particular to the description and character of lands which those words import.

By a treaty with the Shawnees, of May 10, 1854, (Stats., vol. x, p. 1053,) those Indians ceded and conveyed to the United States a certain tract of land, which had been designated and set apart for them in fulfillment of the second and third articles of the treaty of 1825, and conveyed to them by a patent bearing date the 14th day of May, 1844. The land began at a point on the western boundary of the State of Missouri, three miles south of where the State boundary line crosses the mouth of the Kansas river; thence south twenty-five miles; thence due west, &c., and was estimated to contain 1,600,000 acres. By the second article the United States ceded 200,000 acres of land, *to be selected*, between the Missouri State line and a parallel line drawn thirty miles west therefrom, and extending from the Kansas river to the southern limit of the country ceded by the first article. The area between these lines covers 750 square miles, or 480,000 acres. Those of the Shawnees, however, who lived on their own improvements, west of the parallel lines, might, if they desired to remain, select there the same quantity of land for each

individual which was provided for the Shawnees residing east of the line; but the selection was to include the improvement of each family or individual. Those residing east of the parallel line were to be entitled to two hundred acres, and, if the head of a family, a quantity equal to two hundred acres, for each member thereof, including, in every case, the *improvements on which said person or family resided;* and those in the Black Bob and Long Tails' settlement, who desired to hold their lands in common, were allowed to do so. After the selections had been made for the resident Shawnees, there was to be set apart, in one body, land in compact form, under the direction of the President for the absentees. The fifth article provided that the lands, lying between the Missouri State line, and the parallel line thirty miles west of it, should be surveyed as soon after the ratification of the instrument as could be conveniently done, and declared that "no white person or citizen shall be permitted to make locations or settlements within the said limits until after the land shall have been surveyed, and the Shawnees shall have made their selections and locations, and the President shall have set aside the surplus."

Long made his selection within this section of thirty by twenty-five miles, and the referee finds that such lands were not open for settlement, pre-emption, and sale by the United States Government, by order of the President thereof, until the 9th day of July, 1858, of which the said officers of the local land offices had due notice; and he finds that, as a matter of law, up to the 9th day of July, neither the plaintiffs nor the defendants, nor said Long, had acquired any right, legal or equitable, in or to said land.

It is submitted that the referee and the court below mistook the law applicable to the rights of Long, and we

assign for error the decision of the Supreme Court of Kansas adverse to the validity of Long's title, under whom the plaintiffs claim, and adjudging that the patent gives him only a naked legal title, subject to the paramount equities of the defendants.

Any attempted pre-emption settlement, prior to said 9th day of July, was in palpable violation of the fifth article. No right, legal or equitable, could be thereby created, nor could Long be barred or precluded from selecting a tract occupied by intruders and tort-feasors. The defendants, or those under whom they claim, went upon the land in February. They were guilty of an offense against the laws of the United States, and rendered themselves liable to punishment by judicial sentence, and to expulsion from the land by military force. Their wrongful possession was proof of nothing but their own crime, and of the non-occupation of the land by a Shawnee.

Within ninety days after the approval of the survey of the entire tract, twenty by thirty-five miles, the Shawnees were to make their selections; and if they had failed so to do, the Shawnee council were to choose disinterested persons, who were, immediately after the expiration of such ninety days, to make selections of land for them. It is a fair inference from the facts found by the referee, considered in connection with the provisions of the treaty for surveying and selecting, that at the time of Long's notice to the Surveyor General all the Shawnee selections had been made, and the provisions for setting apart the tract for the absentees executed, although the President had by no formal official act set aside the surplus, nor had he by proclamation declared the land to be open for pre-emption settlement. It can not be pretended that the six hundred and forty acres selected by Long

were occupied by a Shawnee, for they were then, for some time had been, and still are, in the actual, although unlawful, possession of the defendants or those under whom they claim. His location did not conflict with any right of the Shawnees, for their selections were then completed. At all events, they never selected this tract, as it was carried to the surplus, and they had no claim or title to the ownership of any specific tract, until it had been actually selected.

The treaty of 1842, which specifies the description of lands subject to the Wyandotte selections, should not receive a narrow and technical construction. By the Indian intercourse act of June 30, 1834, (U. S. Stat., vol. iv, p. 729,) the country west of the Mississippi and not within the States of Missouri and Louisiana was, for the purposes of the act, declared to be Indian country. It was set apart for "Indian use," but various tribes and nations claimed a possessory right, which has been habitually recognized by the United States, who asserted the ultimate title to the soil and an exclusive power to acquire that right. It was in some sense, and so far as their nomadic habits permitted, occupied by these tribes. By a strict interpretation of the treaty, Long might have been excluded from all this territory to which any tribe made claim. The condition of this region has been in many respects essentially changed since the enactment of that law and the making of the treaty. It would be difficult to find within the limits of our whole country lands which more closely correspond with the description than the lands in question. The Shawnees held them at one time by patent. They then ceded them all to the United States, who retroceded 200,000 acres, to be selected within certain well-defined limits, from which the white man was rigorously excluded. The lands were thus set apart for

Indian use. The Shawnees had made progress in civilization and in industrial pursuits, and had improved and cultivated portions of the soil. Their selections were to be made so as to cover their improvements. Where this was not practicable they had, it is true, the privilege of selecting from the remaining lands; but, as heretofore remarked, until the privilege was actually exercised, they had no title to any specific parcel.

The defendants in error insist that the lands were at the time of the selection the lands of the Shawnee Indians. The foregoing remarks show the obvious fallacy of that position.

Long's title has been recognized by the Executive branch of the Government. It is the settled practice of the General Land Office to withhold from an Indian reservee a patent for lands until the Indian Office has either been consulted or has requested it to be issued. Such was, no doubt, the proceeding in this case, and all the selections made by the Shawnees were carefully examined, to ascertain that no conflict existed.

It thus appears that the tract, situate within a region set apart for Indian use was not, at the time of its selection by Long, claimed or occupied by any person or tribe; or, in other words, by a tribe or any member thereof. Having fully complied with the provisions of the treaty of 1842, his title is clear and indisputable.

Another ground taken by the defendants in error is that if these lands were not, at the time of Long's selecting the tract in controversy, the property of the Shawnee Indians, the same were subject to pre-emption and settlement, to which the defendants had secured rights by prior settlement, in February, 1857. The act of July 22, 1854, is cited, which extended the pre-emption laws over all the lands in the Territories of Nebraska and Kansas

to which the Indian title "has been or shall be extinguished." (U. S. Stat., vol. x, p. 309.)

The pre-emption laws were never applicable to lands reserved for any purpose by treaty, law, or proclamation of the President, and the lands in question were reserved from settlement by white persons by a positive stipulation of the treaty. In addition to the notice thus given, Whaley, under whom Whyble claims, was expressly informed of the fact by the local land officer.

Again, the Shawnee treaty was to be obligatory on the contracting parties from its ratification by the President and Senate. It was so ratified on the 2d day of August, 1854, with amendments, to which the Indians assented, on the 28th day of the following month. The President accepted and ratified the treaty, with the amendments, on the 2d day of November. Although a treaty ordinarily speaks from its date, and transfers the property thereby ceded, so as to exclude subsequent alienation of it by the granting party between that date and the day of its ratification, yet by an express provision of the instrument it may be, as in this case, limited to take effect at a future date. So, if there be any incompatibility, which there is not, between the act of July 22 and the Shawnee treaty, the latter abrogates and repeals any conflicting provision of the former. An act of Congress may supercede a treaty, and a treaty may supercede a prior act of Congress.—(Foster & Elam vs. Neilson, 2 Peters, 314. The Cherokee tobacco, 11 Wallace, 616.)

The defendants in error further contend that Long, at the time he made his selection, was confined to "government land subject to pre-emption." This position has been already answered. They also say that if the fifth article excluded the defendants from settling upon the lands in question, it equally prohibited Long, who, it

is assumed, was made a citizen by the Wyandotte treaty of 1855. Long made no "settlement" within the meaning of the treaty. All that he did, or was required to do, was to select the lands by designating them on the township plats on file in the Surveyor General's office.

The article manifestly refers not to Indians, but to whites, whose encroaching spirit leads them so often to disregard the rights and to enter upon the lands of the red man. The treaty extending citizenship to the Wyandottes exempts from its operation such of them as may desire it, and guarantees to them the protection of the United States to such time as shall be determined by the Commissioner of Indian Affairs. That protection is still extended to them, and their tribal organization is maintained. A treaty with them in 1867 secures to them a reservation in the Indian country, which they now occupy. It contains 20,000 acres. (Report Commissioner Indian Affairs for 1872, p. 38.) The referee does not find that Long was a citizen, nor does it appear that any such question was made in the court below.

The next position of defendants is that Long did nothing after the lands were proclaimed by the President to be open for pre-emption and settlement—that is, after the 9th of July, 1858—and that the defendants filed their declaratory statements, and made proof of payment.

This leads to a consideration of the questions arising on Long's title so far as the asserted rights of the defendants, accruing since the last date are concerned. Their pretended inception of a pre-emption settlement, prior thereto was a nullity. We take the case of Whaley, Whyble's grantor, as the determination of it is conclusive as to all the defendants.

On the 30th day of July, 1858, he filed his declaratory statement, dating the time of his settlement the 28th of that

month. (Record, p. 35.) This was the only legal notice he ever gave of his settlement with a view to pre-emption. He is precluded by this date. Whatever rights he has commence with it, for they cannot precede the time of his settlement. Long's selection was then subsisting, and a matter of record in the public archives in the Surveyor General's office. It would have been a vain and futile ceremony for him to reselect the same lands between the 9th and 27th days of the month, when in contemplation of law they were actually vacant, so far as the inauguration of an adverse pre-emption right thereto was concerned. The Surveyor General would undoubtedly have declined to note on the township plats a selection he had already recorded, and of which all parties in interest were bound to take notice. Up to the 27th day of July, Long's selection was therefore evidently not in conflict with any lawful claim; and any subsequent claim to, or settlement upon, the selected tract is declared by the treaty to be null and void.

The defendants submit that the actual settler is the most favored of the entire class of purchasers. He is undoubtedly. He is allowed to purchase at the minimum price "unoffered" as well as "offered" public lands, and he may settle, with a view to pre-emption, upon such as have not been surveyed. These privileges have been conferred upon him by legislation, and we do not question his full right to the undisturbed enjoyment of them. But while the courts cheerfully maintain and vindicate this right, they will not permit him to intrude upon lands set apart for Indian use, nor recognize any pretended equity which originates in a trespass or encroaches upon the prior and, therefore, paramount rights of other lawful claimants. Some stress is made upon the fact that these defendants purchased and paid for the land, which pre-emption and purchase was ap-

from the date when his selection took effect, and cutting off all intervening claims of the defendants.

Fifth. That the settlement of said Whaley, on said tract, with a view to purchase the same under the pre-emption laws, has no lawful inception prior to the 28th of July, A. D. 1858, the date when he declared his settlement commenced, and that if the selection of Long did not attach to said tract prior to the 9th of July, 1858, it had at that date full force and effect, and was in conflict with no outstanding valid claim.

Sixth. The claim of defendants to a tract founded upon a settlement made after such tract was selected by Long is null and void.

W. T. OTTO,
Attorney for plaintiffs in error.

Supreme Court of the United States.

JOHN McALPIN, ET AL.,
Plaintiffs in Error,
vs.
IRAM HENSHAW, ET AL.,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

This is an action in the nature of ejectment, originally brought by plaintiffs in error, under the civil code of Kansas, in the District Court for the county of Douglas, in that State, a tribunal exercising common law and chancery jurisdiction.* The defence relied upon is an equitable right to the *locus in quo* in the defendants,—a defence that the court might entertain in the action.† The action was tried before a referee, who found the facts and the law in the case, and ordered judgment for the defendants below, which was by the court rendered, as it had jurisdiction to do.‡ A motion was made by the plaintiffs below for an order setting aside the report and order for judgment, and on exceptions to the rulings of the court, refusing to grant the motion, the case was taken, on error, to the Supreme Court of the State, where the decision of the court below was affirmed, and the plaintiffs in error in that court have brought the case here for review:

By the record it is sought to present the sole question, whether, under the findings of fact by the referee, and the law applicable thereto, the judgment should have been for the defendants, as rendered.

The possible peculiarity in the Civil Code of Kansas, conferring jurisdiction at law and in chancery at once upon the same

*Civil Code of '59, Compiled Laws of Kansas, p. 126, sec. 10; id., p. 454, sec. 1.
†Id., p. 140, sec. 102. ‡Id., p. 186, sec. 381; Mp 172 8294

tribunal, in no wise abrogates the general doctrine that, in cases of the nature of the one at bar, the plaintiffs below must rely upon the strength of his own title, and, to succeed in his action, must show a paramount title.*

The plaintiffs' claim to the land in question is founded upon conveyances to them, emanating from one Irwin P. Long,—a Wyandotte Indian, who held under a patent from the United States.†

The record shows that the patent was issued to Long, while defendants were in the actual occupancy of the premises claiming title thereto,‡ thus giving notice of their rights sufficient to put the plaintiffs upon inquiry,‖ and therefore they must rely upon the validity of Long's title.

In *Stephens vs. M'Cargo*,§ this court (MARSHALL, C. J.,) use the following language:

"The proposition that a patent is an appropriation of the land it covers, although the proceedings previous to its emanation may be irregular and defective, is unquestionably true, but the principle has never * * * been applied to a case in which the opposing title to the particular land in controversy had its commencement before the patent issued."

The court below then, had a right to go behind the patent in determining the equities as between these parties.

This proposition being conceded, the defendants propose to prove the following:

I. That at the time of the attempted location of the reserve, or float, issued to Long, on the lands in question, they were the lands of the Shawnee Indians, and not subject to being taken under the Wyandotte reserve, or float.

II. That if the lands in question *were not*, at that time, the property of the Shawnee Indians, then, that the same were lands subject to preemption and settlement, to which defendants in error had secured rights as preemptors, by prior settlement thereon and improvement thereof.

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* State of Kansas vs. Stringfellow, 2 Kansas R., 263, 3/6 † See Record, p. 32 (printed Transcript)
‡ Record, p 25-36 ‖ Hughes vs. U. S., 4 Wall, 232, 236
§ 9 Wheat., 510-11; see also Bush vs. Ware, 15 Pet., 107, and 4 Wall., 232.

III. That at the time of the attempted location of said Long reserve, upon the lands in question, it could legally be located only upon lands "subject to preemption and settlement," and conferred no exclusive powers or privileges, and that at this time the Wyandottes, who, including Long, had been made citizens, were prohibited from making any location on the lands in question by the fifth article of the Shawnee treaty of 1854.

IV. That the Long float, or reserve, was not located upon the lands in question after the title thereof passed from the Shawnees, and the same were proclaimed open to preemption and settlement, but that immediately after that proclamation the defendants, being personally qualified so to do, made settlement thereupon, filed their declaratory statements,—performed every act required by the preemption laws, and were permitted to, and did, preempt and pay for the same, and received their certificates of purchase thereof.

V. That the plaintiffs in error must be deemed to hold, under the patent issued to their grantor, Long, the legal title, in trust for defendants in error, they having the paramount equitable right thereto, as the court below decided.

FIRST: *On the first proposition the defendants in error maintain*: 1. Long, claiming the land as a Wyandotte Indian, under the provisions of treaties with his tribe, his title to the land in question, as between him and the United States, must depend upon these treaty provisions, and the provisions of other treaties, so far as they relate to the subject matter, the laws of the United States, and the acts of Long thereunder.*

"He must be shown to have complied with all the requirements of law, and that the plaintiffs have lost something by the acts of the defendants," is the reasonable ~~language~~ conclusion of a California Court.†

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*Wilcox vs. Jackson, 13 Pet., 498, 517

†38 Cal., 499, 514

2. The treaty provision first involved in this inquiry, is that contained in the fourteenth article of the treaty with the Wyandottes, of October 5th, 1842,* which is as follows:

"The United States *agree to grant*, by patent in fee simple, to each of the following named persons, and their heirs, all of whom are Wyandottes by blood or adoption, one section of land, of six hundred and forty acres each, out of any lands west of the Mississippi, [afterwards changed by amendment to Missouri,] river, *set apart* for Indian use, *not already claimed or occupied by any person or tribe*, viz., * * * Irwin P. Long" [among others]. "The lands hereby granted to be selected by the *grantees*, surveyed and granted at the expense of the United States, *but never to be conveyed* by them, or their heirs, without the permission of the President of the United States."

3. The referee finds as the acts in locating this grant to the Indian Long:

"That, on the 8*th day of May, A. D.* 1857, *Samuel Stover, a white man*, as agent for said Long, filed, in the office of the Surveyor General of Kansas and Nebraska, a written notice to the effect that he, as such agent, had that day selected and located the reserve of land of Long, under said treaties" [this treaty of 1842 and that of 1855, thereinbefore mentioned,] "upon the lands described," * * * and that notice thereof was sent to the Department of the Interior, and that a patent issued therefor to said Long, May 3d, 1861."†

4. The next question that logically arises is whether the lands in the petition described were "lands west of the Missouri river, set apart for Indian use, not already claimed or occupied by any person or tribe," within the meaning of this treaty provision.

The territory evidently intended by the term "lands set apart for Indian use," was the *Indian Country*, as defined by the act of June 30th, 1834,‡ and the acts extending the same, and includes only the country set apart exclusively for Indians and tribes in common, on which "no white man or citizen" was permitted to go or traffic.‖

5. But this point will best be considered hereafter with reference to the lands in question. Should it be granted at present, for arguments sake, that the lands in question were a part of the country known as that "set apart for Indian use," with-

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*7 Stat. at Large, 608-9. †Record, p. 15. ‡4 Stat., 729.
‖ Brightley's Dig., pp. 428-437, secs. 57-62-119.

in the meaning of this treaty provision,—a proposition by no means conceded,—yet the question would remain whether the lands were "claimed or occupied by any person or tribe."

The referee finds as a fact in the case:

That the lands in question "are parcel of the lands ceded to the United States, by the Shawnee tribe of Indians, by treaty finally ratified, with amendments, November 2d, 1854,* and lying between the Missouri State line and a line parallel thereto and west of the same thirty miles distant."†

6. The status of these lands, as gathered from the provisions of the treaties with the Shawnees, and the laws of Congress, is as follows:

By the articles of convention, made between William Clark, Superintendent of Indian Affairs, and the Shawnees, of November 7th, 1825, in exchange for their lands near Cape Gerardeau, on the Mississippi, held under the authority of the Spanish government,‡ the Shawnees had the right to select a tract of land equal to fifty miles square, on the Kansas river, to be "laid off either south or north of that river and west of the boundary of Missouri."‖

By act of Congress of May 28th, 1830, the President was authorized to make the exchange,§ and:

"To assure the tribe, or nation, * * * that the United States will forever secure and guaranty to them, their heirs or successors, the country so exchanged with them," [¶3] and to "cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance *from any other tribe or nation of Indians*, or from any other person or persons whatsoever" [¶6].

By the articles of agreement and convention of August 8th, 1831, the United States agree to grant, by patent in fee simple, 100,000 acres of land, to be located under direction of the President, within the limits of the fifty miles square reserve, provided for by the treaty of 1825,** and to guarantee that said lands "shall never be within the bounds of any State or Territory, * * * and cause said tribe to be protected * * * against all interruption or disturbance *from any other tribe or na-*

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* 10 Stat., 1056.
† Record, p. 26
‡ 7 Stat., p. 284, art. 1.
‖ Art. 2, 3.
§ 4 Stat., p. 412, sec. 2.
** 7 Stat., p 356, art. 2

tion of Indians, or from any other person or persons whatever."*

That this fifty miles square reserve was located so as to include the lands in question, is shown by the recital of the boundaries of the lands conveyed by patent issued pursuant thereto, contained in article I of the treaty with the Shawnees of May 10th, 1854.†

In the act under which the Territory of Kansas, was organized, peculiar protecting provisions were inserted,‡ and in the act admitting the State, all these protecting provisions were recognized and preserved.‖

7. "The treaty of 1854 left the Shawnee people a united tribe, with a declaration of their dependence on the National Government for protection and the vindication of their rights."

This was the view taken by this court, in 1866, of the condition of these Indians, as set forth by JUSTICE DAVIS, in *the Kansas Indians*,§ where the history of the title to their lands, of which those in question formed a part, is given at length.

8. At the time of this Wyandotte treaty of 1842, the lands in question *were* owned, "occupied" and "claimed" by the Shawnees, and continued to be until their status was changed, as hereinafter indicated,—and, so far as the Wyandotte Indians, as Indians, or the said Long, are concerned, continued to be so occupied and claimed by the Shawnees until the residue was set apart and proclaimed open to preemption and settlement.

The unceasing westward movement of the whites changed the surroundings of the Indian; this, and the rapid diminution in numbers of the latter, creating a less extended want for "hunting grounds,"—called for a corresponding change in the legal status of that large and almost untraversed region known as the "Indian country,"—called for a gathering into a closer compass the different tribes, and a consequent closer defining

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* Art 10, p. 357, 7 Stat. † 10 Stat., 1053-4 ‡ 10 Stat., 283, sec. 19.
‖ 12 Stat., 126, sec. 1. § 5 Wall., 752-7. que. from 737

of their respective rights, as between each other, and of rights as between them and their white neighbors.

The 1,600,000 acres of land granted by the treaty of 1825, subject to the provisions of the treaty of August 8th, 1831, including the lands in question, were, and remained, the property of the Shawnees until the treaty of May 10th, 1854.*

By that treaty the Shawnees ceded to the United States this 1,600,000 acres,† and the United States ceded back to the Shawnees 200,000, thereof, "to be selected between the Missouri State line and a line parallel thereto, and west of the same thirty miles distant,"‡ including the lands in question.‖

Out of these 200,000 acres, east of the thirty mile line, were to be carved certain head-rights,§ and set off certain tracts to be occupied by Shawnees, in common** and for the protection of certain absentees; the residue was to be

"Set apart in one body of land, in compact form, under the direction of the President of the United States, and all such Shawnees as return to, and unite with the tribe, within five years from the proclamation" [of the treaty,] "shall be entitled to the same quantity of land" as their brethren, &c., * * * "and whatever portion of said surplus remains unassigned, after the expiration of said five years, shall be sold, as hereinafter provided," &c.,†† the selections to conform to the legal subdivisions of the survey‡‡ provided for in art. 5.‖‖

9. The fifth article also provides:

"No *white person or citizen* shall be permitted to *make locations or settlements* within the thirty mile limits, until after all of the lands shall have been *surveyed*, and the Shawnees shall have made their selections and locations, *and the President shall have set apart the surplus*."

This is an effectual segregation of the 200,000 acres from the public domain, if the first article of the treaty constituted it public domain, and in any event an *appropriation* thereof until November 2d, 1859, five years from the final signature of the President to the treaty,§§ unless the Shawnees selections should be previously made, and the residue was previously set apart by the President. It was an appropriation of the land to the *Shawnees*,—not the Wyandottes.¶

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* 10 Stat., 1053. † Art. 1. ‡ Art. 2, p. 1054, as amended p. 1060. ‖ Record, p 36
§ Art. 2, 2d and 3d clauses. ** Art. 2, clause 3, p. 1055. †† Art. 2, clause 3, p. 1055.
‡‡ Id., p. 1056. ‖‖ Id. §§ 10 Stat., 1063. ¶ 1 Scam. R., 354, 355-7

10. The Shawnees had an equitable right to the land,* were tenants in common with the United States therein.† Under this treaty the government, even, had no power to dispose of these lands, except after the selections by the Shawnees, and after the surplus had been set apart, by the President, as public lands. Long, therefore, could not acquire any right to any part of these lands, by virtue of the provisions of the treaty of 1842, until after such setting apart thereof by the President.‡

As to Possession at least Ibrug v Burcham 1 Black 347

SECOND. On the proposition that, if the lands in question *were not*, at that time the property of the Shawnee Indians, then, that the same were lands subject to preemption and settlement, to which defendants in error had secured rights as preemptors, by prior settlement thereon and improvement thereof,—the defendants submit:

1. While the rights of Long, the Wyandotte Indian, to lands mentioned in his floating grant, remained as the treaty of 1842 left them, the act of July 22d, 1854, was passed, extending the preemption laws over "all the lands to which the Indian title has been, or shall be extinguished" within the Territories of Nebraska and Kansas.‖

2. If the Shawnees had no rights to, and did not claim or occupy the lands in question, within the meaning of the provisions of the treaty with the Wyandottes, of 1842, it was because their title thereto had been extinguished; and the defendants did occupy and claim them at the time of the attempted location of the float thereon, by Long;§ and it is apparent that they are "persons," within the meaning of the fourteenth article of the treaty of 1842. They were white men,—citizens,—and the float was attempted to be located by Stover,—another white man,—in May, 1857.**

3. The defendants had made settlement on the lands in February, A. D. 1857, and being personally qualified so to do, per-

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*Crews vs. Burcham, 1 Black, p. 352, 357. †Mann vs. Wilson, 23 How., 457, 463
‡See Cholard vs. Pope, 12 Wheat., 586. ‖10 Stat., 309. §See record, p. 34
**See record, p. 31

formed all the acts required by the preemption laws, or offered to perform them,* which is equivalent as against the plaintiffs to full performance,† and their rights date back to the time of their settlement.‡

4. The defendants were of that class known as "the most favored of purchasers,"‖ whose rights are superior to those of the actual absolute purchaser at the land office,§ or those held under a New Madrid certificate,** and better than floating rights under the acts of July 14, 1832,†† or under the act of June 19th, 1834.‡‡

5. No treaty stipulation,—no provision of law,—nor any action on the part of the officers of the government, with respect to the lands in question, is, or can be, shown, that gave unto Long,—the Wyandotte Indian,—any peculiar or exclusive right to locate his float thereon, in May, 1857; but the attempted location must be deemed to have been made subject to existing rights acquired by defendants, under the law—if they had any —and subject to the provisions of the treaty with the Shawnees pertaining to these very lands.

THIRD. At the time of the attempted location of said Long reserve, upon the lands in question, it could legally be located only upon lands "subject to preemption and settlement," and conferred no exclusive powers or privileges; and at this time the Wyandottes, who, including Long, had been made citizens, were prohibited from making any location on the lands in question by the fifth article of the Shawnee treaty of 1854. On this proposition the defendants maintain:

1. In 1855, under the preemption laws, and the laws and treaties with the different tribes, very much of what had for-

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* See record, p. 23.

† Cunningham vs. Ashley, 14 How., 377; Lyttle vs. Arkansas, 9 How. 333.

‡ Cunningham vs. Browning, Bland. R., 299.

‖ Clements vs. Warner, 24 How., 397; 9 How., 333; 24 How., 394.

§ 24 How., 394. ** Hale vs. Gaines, 22 How., 144. †† 4 Stat., 603.

‡‡ 4 Stat., 678. See Cunningham vs. Ashley, 14 How., 377, and see Silver vs. Ladd, 7 Wall., 224; Stark vs. Starr, 6 Wall., 402, 405.

merly been known as the "Indian country" had been opened to settlement, and settled upon by the whites, and other portions had been set apart for specific tribes, with provisions not very dissimilar to those contained in the treaty with the Shawnees, of 1854; and to relieve the Wyandottes and preserve their rights, without in any way infringing upon the vested rights of other Indians, or of white settlers, the treaty with the Wyandottes, of January 31st, 1855, was entered into, the ninth article of which provides:

"That each of the individuals to whom reservations were granted, by the fourteenth article of the treaty of March 17th, 1842, or their heirs or legal representatives, shall be permitted to *select* and *locate* said reservations on any *government* lands, west of the States of Missouri and Iowa, *subject to preemption and settlement*, said reservations to be patented by the United States in the name of the reservees, as soon as practicable after the selections are made; and the reservees, their heirs or *proper* representatives, shall have the unrestricted right to sell and convey the same whenever they may think proper."*

2. The lands in question were not set apart as public lands, and open for preemption and settlement until July 9th, 1858,† a time subsequent to every act performed by the white man Stover, in the location of the Long float.‡

3. It has been contended on the part of the plaintiffs in error that on May 8th, 1857, when Stover attempted to locate this Wyandotte reserve, the float might be located either, *first*, "on *any* lands west of the Missouri, set apart for Indian use, and not otherwise claimed or occupied by any person or tribe," as provided in said treaty of 1842 [art. 14], or, *second*, upon "any government lands subject to preemption and settlement," as provided by said treaty of 1855 [art. 9], and, *third*, that by treaties with the Shawnees, "all the lands between the Missouri State line and a line parallel thereto and west of the same thirty miles distant," were set apart for Indian use, and that the lands in question were never occupied or claimed by any person or tribe, within the meaning of said Wyandotte treaty of 1842 [art. 14], because the same were never selected, as pro-

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*10 Stat., 1162-3.
†See record, p. 36-7
‡See record, p. 47

vided for in the Shawnee treaty of 1854, but were afterwards set apart and proclaimed open to preemption and settlement; and hence, it is argued, that the location, by Stover, of the Long reserve in May, 1857, as it did not prejudice the Shawnees, was legitimate, because it was on "lands set apart for Indian use," and that thereby the plaintiffs' grantor acquired a right to the land in question, prior in date, and therefore superior to the rights of defendants, who could acquire no rights until after the lands were open to preemption and settlement, and that plaintiffs' grantor could not be disturbed, in the rights so acquired, by any action of defendants subsequent to the location of the float, because of the last clause of the ninth article of the treaty with the Wyandottes, of 1855, which provides that:

"Any selection of, settlement upon, or claim to, land included in any of said reservations, made by any other person or persons, after the same shall have been selected by the *reservees*, their heirs or legal representatives, shall be null and void."*

And, further, it was contended that the term "not already claimed or occupied by any person or tribe," used in the fourteenth article of the Wyandotte treaty of 1842, does not apply to defendants, preemptors, but is confined to Indians exclusively; and that the provisions of the ninth article of the Wyandotte treaty of 1855, giving the right to the "reservees, their heirs or *proper* representatives," to sell their reserves, and the making of them citizens, allowed the location thereof by Stover, the white man.

4. In reply the defendants submit for consideration that:

(*a.*) Neither the provisions of the fourteenth article of the treaty of 1842, granting lands to certain Wyandotte Indians, nor the provisions of the treaty of 1855 [art. 9], protecting those grants, gave any exclusive rights or privileges over other claimants to any particular land, until the reserves had been *legally* located. The government, thereby, simply undertook that there were lands to the amounts named, remaining subject

* 10 Stat., p. 1163.

to the reserves; and, without violating the obligation of these contracts, the government might reserve any part of the class of lands indicated.*

(*b.*) The Wyandotte treaty of 1842, providing for these floating grants, was a stipulation *merely*, to grant the land when selected according to law; it was merely an agreement *to* grant, and not a present grant.†

(*c.*) Such a stipulation or covenant does not go with any particular land; and any subsequent rights acquired in any lands of the government, or of Indians, cannot be disturbed for any reason growing out of these floats, until legally located.

The plaintiffs' grantor had, by the treaty, no power to authorize a location on lands *previously appropriated.*‡

(*d.*) These Wyandotte floats were, in effect, grants of land unappropriated, and the location thereof will be governed by the same just rules that have governed the location of floating grants to other Indians,—as the Cherokees.‖

(*e.*) Lands held in trust for the Shawnees, by virtue of a treaty made for *their* benefit and protection, will not be allowed to be taken thereunder.

(*f.*) It was not the object of the treaty of 1854, with the Shawnees, thereby to give rights in the lands in that treaty mentioned to the Wyandottes, nor to make the rights of a Wyandotte thereto, superior to those of any other claimant of land. These lands were a part of the Shawnee reserve, the remainder of which was ceded to the United States, by the Shawnees, *on condition* that the lands in question should be held *in trust for them.*

(*g.*) Even on the theory that the lands in question were "lands set apart for Indian use," within the meaning of the fourteenth article of the Wyandotte treaty of 1842, yet, in equity, the record must show all the facts necessary to establish a clear right on the part of the grantor of plaintiffs to

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*Texas vs. Delesdenier, 7 Texas, 76; 3 Texas, 67.
†See article 14, 7 Stat., 608.
‡Rutherford vs. Greene, 2 Wheat., 202.
‖19 Ark. R., 94.

locate thereon. It fails in this: it is not shown that, at the time of the location of the Long float, the selections of the Shawnees had been made and the surplus set apart. The record shows, on the contrary, that the lands, at that time, *were still reserved.**

(*h.*) The action shown to have been taken by the officers of the government cannot change their status. "The officers of the government are the agents of the law. They cannot act beyond its provisions nor make compromises not sanctioned by it."†

(*i.*) And, by the Shawnee treaty of 1854, it is apparent not only that this whole tract, lying east of the thirty mile line, was actually occupied by the Shawnees, who had improved certain parts thereof, throughout its whole extent, but also the treaty was changed, by amendment, from a mere reservation by them, to an actual *cession to them* of the 200,000 acres.‡

(*j.*) A more reasonable construction of the treaties with the Wyandottes is, that the provisions of the fourteenth article of the treaty of 1842 were, so far as the reserves granted—remaining *unlocated* are concerned,—changed by the ninth article of the treaty of 1855, so that they could be located, instead of upon lands "set apart for Indian use," on "any government lands open to preemption and settlement," that the latter provision took the place of the former. This construction is the only one that accords with the fact that, by the act of Congress of 1854, extending the preemption act, of 1841, over the Territories of Nebraska and Kansas, "all the lands to which the Indian title had been, *or should be*, extinguished," were open to preemption and settlement. This act was passed on July 22d, while the treaty with the Shawnees was ratified May 10th, 1854, and the treaty with the Wyandottes January 31st, 1855.

(*k.*) If the plaintiffs' grantor could hold these lands, by virtue of the location of the Long float thereon, in May, 1857, it was by virtue of the power of the United States to dispose of

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* Record, p. 35-6 † Lindsey vs. Hawes, 2 Black, 558. ‡ 10 Stat., 1060.

them at that time to this person Long. At that time the lands in question were either "Indian lands" or "government lands," a part of the "public domain." If Indian lands, set apart for Indian use, they were the *property* of the Shawnees. They had an equitable right to them,* and the only authority which the officers of the United States could exercise over them was by virtue of the treaty pertaining to them. The lands were, before the Shawnee treaty of 1854, the absolute property of the Shawnees, and by its terms, they are *reserved*, held in trust for them, *re-ceded to them*, in fact. Under this treaty the officers of the government had no power to dispose of them, except *after* the selections of the Shawnees, and *after* the surplus had been set apart, and *then* only as a part of the public domain, and for the benefit of the Shawnees.

(*l.*) The same treaty that enabled the Wyandotte Indians to locate these floats on "lands subject to preemption and settlement," made these Indians, including Long, *citizens*, "to all intents and purposes," with "all the rights, privileges and immunities of such citizens," and they were made "subject to the laws of the United States and of the Territory of Kansas, in the same manner as other citizens of said Territory."†

(*m.*) Therefore it is that, by virtue of the treaty of 1855 with the Wyandottes, the float could not be located upon the lands in question, because the fifth article of the treaty with the Shawnees, of the year before, was still subsisting. It provides that "no white person nor *citizen* shall be permitted to make *locations* or settlements, within the thirty mile limits, *until after all the lands shall have been surveyed, and the Shawnees shall have made their selections and locations, and the President shall have set apart the surplus.*"‡ Protection against Indians and Indian tribes was provided for in another part of the treaty. The language used, "no white person or *citizen*," clearly covers Wyandottes made citizens;

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*Crew vs. Burcham, 1 Black, 352, 356

†10 Stat. at Large, p. 1159. Art 1

‡10 Stat. at Large, p. 1056. Art 5

and the use of the word "*location*," as well as "settlement," thereafter, indicates clearly that other than preemptors, who secure their rights by settlement, were intended, and it is evident that citizenized Indians were included in the legislative contemplation.

FOURTH. The Long float, or reserve, was not located upon the lands in question after the title thereof passed from the Shawnees, and the same were proclaimed open to preemption and settlement, but immediately after that proclamation the defendants, being personally qualified so to do, made settlement thereupon, filed their declaratory statements,—performed every act required by the preemption laws, and were permitted to, and did, preempt and pay for the same, and received their certificates of purchase thereof. *On this proposition the defendants contend:*

1. All these treaty provisions were in keeping with the spirit of progress shown in the laws, and other treaties, in other respects, and were also in keeping with the fact that "all the lands to which the Indian title had been, or might be, extinguished," had been opened to preemption and settlement.

2. The beneficient intention of this law of the country, which is termed "one of its most benevolent statutes, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands,"* to advance the interest of the actual settler should not be defeated.

In the language of this court:

"By the act of 1841, the preemption privilege, in favor of actual settlers, was extended over all the public lands which were *fitted* for agriculture and prepared for market. Later statutes *enlarge* the privilege, as to embrace lands *not* subject to sale or entry, *and clearly evince that the actual settler is the most favored of the entire class of purchasers.*†

It is right that the law *is so.* "It is founded in an enlightened public policy, rendered necessary by the enterprise of our citizens. The adventurous pioneer, who is found in advance of our settlements, encounters many hard-

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* Lindsey vs. Hawes, 2 Black, 562.

† 24 How., 397., CAMPBELL, J.

ships, and not unfrequent dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him. That this is the natural feeling is shown by the course of legislation for many years."‡

3. But if the defendants had not rights superior to these Wyandottes, to the lands in question, they, at least, had equal rights thereto with them: they, then, *stood on precisely the same grounds*, each subject to the law and treaties, and their respective rights are to be determined by their acts under the law, *performed after each had a right to take action* with respect to the land in question.

4. Their rights to take action, in acquiring the lands in question, commenced from the same day, viz.: the 9th day of July, A. D. 1858, the day on which they were proclaimed, by the President, as open to preemption and settlement.‖

The only action taken by plaintiffs' grantors was on the 8th of May, 1857, through an agent,—Stover, a white man,—which action was reported September 17th, 1857.§

5. These Wyandotte reserves, by the terms of either treaty, could not be located *except by the reservees themselves*, unless they should be dead or incompetent.* If the reserve to Long was located by virtue alone of the treaty with the Wyandottes, of 1842 [art. 14], it was located in his behalf as an Indian, as on lands "set apart to Indian use." Could Long, as an Indian, act through the agency of the white man Stover? Would not intercourse with him be confined—so far as the whites are concerned—to the agent of his tribe?† And if Long, as a citizen,—made so by the treaty with his tribe, of 1855,—caused the location of his float to be attempted, then it must be deemed to have been attempted to be located on the lands in question as "public lands, subject to preemption and settlement."

6. If any rights to the lands in question could have been acquired by either party, at the time of the attempted location of

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‡ Lyttle vs. Ark., 9 How., 333. Opinion of Court, McLEAN, J.
‖ See Ref. Report, record p. 26-7 § Record, p. 23-
*Art. 9, treaty of 1855, 7 Stat., 608; Art. 14, treaty of 1842, 10 Stat., 1162.
† Worcester vs. Georgia, 6 Pet., 547-8 – a case illustrative of the spirit of exclusiveness assumed by the Government in dealing with & for the Indians.

the float, and if they stood upon equal grounds, as to their rights to acquire the lands, as has before been suggested, the defendants, by a prior settlement, improvement and attempt to preempt, acquired such rights. The defendants made settlement February, 1857, and within thirty days thereafter attempted to file, and were in visible and notorious occupancy of the premises, improving, and had made large and valuable improvements on the same, when Stover took the first step.*

This was enough to put plaintiffs' grantor on inquiry.†

7. The attempt by Stover, at the time he sought to lay this Long float, was an act to defraud and wrong the defendants out of the valuable and hard earned improvements they had placed thereon. If the latter were trespassers upon the Shawnees the former was likewise a trespasser, made so by the treaties with the Shawnees.

The plaintiffs should at least show that there were not other lands subject to entry under the float.

8. But it is apprehended that the lands were not subject to be taken by either party until after they were proclaimed opened to preemption and settlement, on July 9th, 1858, and then only by virtue of their being public lands; and that the rights of the parties thereto will depend upon their respective acts done after that date.

9. After the lands were proclaimed open to preemption and settlement the plaintiffs' grantor took no steps whatever, and no steps whatever were taken in his behalf after September 17th, 1857.

10. These floats, in order to be available, had to be *located*. This implies positive affirmative *action* on the part of the grantor of the plaintiffs. The statute prescribes that action.‡

11. The moment these lands were thrown open to preemption and settlement, the defendants' possession thereof became legal, and their equitable rights to the lands date from that time—viz.: July 9th, 1858. After this date the defendants were

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*See Report, record, p. 50 †Hughes vs. U. S., 4 Wall., 232. ‡10 Stat. 1162-3, art 9.

permitted, by the officers of the government, to file on the lands in question, which they did do July 30th, 1858; dating, at the suggestion of these officers, their settlement July 22d, 1858, and on the 5th day of May, 1859, the defendants purchased *and paid for the lands*, and took their evidence of title, which preemption and purchase was approved by the Commissioner of the General Land Office, August 10th, 1860: prior to the issuing of the patent to plaintiffs' grantor.* The date of the patent is May 30th, 1861.†

12. The preemption laws give the *paramount and superior right* to the *prior settlement* and claimant, other things being equal.

13. The claims of defendants, then, are clearly covered by the law:

"The claim of a preemptor is *not* that shadowy right which by some it is considered to be. Until sanctioned by *law* it has no existence as a substantive right, *but when covered by the law it becomes a legal right, subject to be defeated only* by failure to perform the conditions annexed to it."‡

FIFTH. That the plaintiffs in error must be deemed to hold, under the patent issued to their grantor, Long, the legal title, in trust for defendants in error, the latter having the paramount equitable right thereto, as the court below decided. *On this proposition the defendants finally contend:*

1. The plaintiffs' grantor took his patent with notice of the defendants' rights to the land, and subject to them.‖

2. The only action of the Government, as to the lands in question, after the same were opened to preemption and settlement, and prior to the issuance of the patent, was in allowing the defendants to file on and the receiving the pay for the same, and the issuing of the certificate of purchase. This gave the

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*See Referee's Report, record, p. 35-6 †Record, p. 35

‡Opinion of McLEAN, J., in Lyttle vs. Ark., 9 How., U. S. Sup. Ct., 333; ~~also 20 How., 6; 9 Black, 554; 22 How., 193;~~ 24 How., 394; 1 Scam., 344.

‖Story vs. Lehmer, 10 Ohio N. S., 93. See Cunningham vs. Browning, 1 Bland, 299; 1 Scam., 344; White vs. Cannon, 6 Wall., 443.

first and prior equitable right to the land, so far as evidenced by governmental action.

3. The issuance of the patent was but a ministerial act,* and the legal title granted thereby ought to be transferred to defendants, as the judgment of the court below attempts to do.†

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*Ware vs. Bush, 1 McLean, 535; 2 Clark [Iowa], 11; Bush vs. Ware, 15 Pet., 108.
†Nelson vs. Moon, 3 McLean, 319. Lindsey v Hawes 2 Black on p 563
Silver v Ladd 2 Wall 228